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# ONTARIO LABOUR RELATIONS BOARD REPORTS

July 1985





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# ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1985] OLRB REP. JULY**

**EDITOR: NIMAL V. DISSANAYAKE**

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**3444-84-R** Butterfield Workers Association, Applicant, v. **Butterfield Division, Litton Canada Inc.**, Respondent, v. Communications, Electronic, Electrical, Technical and Salaried Workers of Canada, Intervener

**Trade Union Status - Election or acclamation of officers occurring month prior to adoption of constitution - No subsequent confirmation or ratification - Organization failing to prove status in circumstances**

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *D. M. Blair* and *S. O'Flynn*.

**APPEARANCES:** *C. J. Abbass*, *Peter C. Wansbrough*, and *Bradley R. Blair* for the applicant; *Peter Thorup*, *M. Van Sickle*, *H. Fisher* and *G. Denney* for the respondent; *Stephen M. Grant*, *Kevin Whitaker* and *Lloyd Saunders* for the intervener.

#### **DECISION OF THE BOARD;** June 12, 1985

1. The name of the respondent is amended to "Butterfield Division, Litton Canada Inc."
2. This is an application for certification.
3. The applicant has not previously been found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. Accordingly, at the hearing of this matter the parties were afforded an opportunity to present evidence and argument on the threshold question of whether or not the applicant is a trade union within the meaning of the Act. The sole witness called to testify before the Board concerning that issue was Peter C. Wansbrough. Mr. Wansbrough, a machine operator in the employ of the respondent, was advised by some of his fellow employees in December of 1984 that meetings were being held that month to consider the formation of an employees' association. Although he did not attend any of those meetings, Mr. Wansbrough did attend a meeting that was held on the evening of January 6, 1985 at a hall near Smiths Falls. Between 35 and 40 of the respondent's work force of approximately 200 employees were in attendance at that meeting, which was chaired by Pat McNeely, the employee who headed a "steering committee" which (Mr. Wansbrough was advised by other employees) had been established at a prior meeting. At the January 6th meeting, the employees in question purported to acclaim Mr. Wansbrough, Junior Comstock, and Charlie Dalton as president, vice-president, and treasurer of the applicant, respectively. They also purported to elect Brad Blair as secretary. A general discussion of the objects and purposes of the applicant was then held and a committee headed by Mr. Wansbrough was "directed to bring in a constitution". Some of the employees in attendance at that meeting purported to join the applicant by signing membership cards and paying a dollar to Mr. Wansbrough. Those cards were in the following form:

## MEMBERSHIP CARD

This is to certify that

-----  
name

is Member in good standing

of the

Butterfield Workers Association

Each of the “members” was provided with a receipt signed by Mr. Dalton, to whom Mr. Wansbrough gave the money after collecting it from the employees. The decision to charge a \$1.00 “initiation fee” was made by Messrs. Wansbrough, McNeely, Comstock, and Blair.

4. Following that meeting Mr. Wansbrough continued to sign up employees as “members” of the Association by collecting a dollar from them and having them sign a membership card. Having obtained copies of the constitutions of various employee associations representing employees at other companies in Smiths Falls, the members of the aforementioned committee met at the home of Mr. Dalton to review those constitutions and select the constitutional provisions which they felt to be appropriate. The clauses which they selected were later given to John S. Kirkland, Q.C., who agreed to have his secretary type a constitution comprised of those clauses. A further meeting was held at the aforementioned hall on February 10, 1985 at 7:00 p.m. Notice of that meeting was given to employees by word of mouth, which was the same manner in which notice of the meeting of January 6, 1985 had been given to employees. Approximately 15 to 20 “members” of the applicant were present at that meeting, which was also attended by Mr. Kirkland. The draft constitution was submitted to the meeting and, following a general discussion, was unanimously passed. The desirability of applying for certification was then discussed and Mr. Kirkland was retained to contact the Board and prepare an application for certification.

5. On February 20, 1985, Mr. Kirkland filed with the Board an application for certification on behalf of the present applicant. That application (Board File No. 3095-84-R) was “withdrawn by leave of the Board” on April 12, 1985, at the request of the applicant. The instant application was filed with the Board on March 26, 1985 and is supported by membership evidence (in the form of combination applications for membership and receipts) signed in March of 1985.

6. Article 2 of the Constitution describes the “objects and purpose” of the applicant as follows:



- 2.1 The purpose of the Association is to represent the members in collective bargaining and in all other relations with their employers and to protect, maintain and advance the interests of the workers within its jurisdiction without regard to craft, age, sex, nationality or creed.
- 2.2 The Association shall also seek to improve its members' wages, hours and conditions of employment and may engage in legislative, political, educational, civic, welfare and other activities which further directly or indirectly the membership [sic] of the members of the Association and of workers everywhere.
- 2.3 To achieve the objectives and purposes of the Association, its funds and property may be used, managed, invested and expended not only for the purpose and objectives expressly set forth in this Article and otherwise in this Constitution, but also for any additional purposes and objectives not inconsistent therewith as may be contained at any time in the resolutions and programs adopted and/or ratified by conventions of the Association or by its Executive Board.

7. The Constitution also sets forth a procedure for electing officers and calling meetings. Articles 4 and 10 provide, in part, as follows:

#### ARTICLE 4- OFFICERS AND EXECUTIVE BOARD

- 4.1 There shall be an Executive Board of the Association consisting of a President, Vice-President, Secretary, Treasurer, two Trustees and a Chief Steward.
- 4.2 The President, Vice-President, Secretary, Treasurer, the two Trustees and the Chief Steward shall all be elected for a one (1) year term commencing with the founding meeting and every year thereafter.

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#### ARTICLE 10 - MEETINGS

- 10.1 Regular membership meetings will be held once each month.
- 10.2 A quorum of at least ten (10) members must be present at regular membership meetings for the transaction of business.
- 10.3 A special general meeting of the members of the Association may be called at any time by the Executive Board and shall be called after a written request of a least ten (10) members has been received by the Executive Board requesting such a meeting.
- 10.4 A special general meeting shall be held within fifteen (15) days after the receipt of the written request referred to above by the Secretary.

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No elections were held at the February 10, 1985 meeting, nor was the January 6, 1985 election or acclamation of Messrs. Wansbrough, Comstock, Blair, and Dalton ratified or affirmed at the February 10, 1985 meeting or at any other time prior to the hearing of this matter.

8. Section 1(1)(p) of the Act provides as follows:

“trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

The Board has indicated in a number of cases a series of steps which are generally sufficient to establish that such an organization has been brought into existence. Those steps were summarized as follows in *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797, at paragraph 11:

1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings.
2. The constitution should be placed before a meeting of employees for their approval either as originally drafted or as amended at the meeting.
3. The employees attending the meeting should be admitted into membership. In this regard it is well to keep in mind section 1(1)(j) [now section 1(1)(l)] of the Act which defines a union member to include a person who has applied for membership in the union and on his own behalf paid to the union at least \$1.00 in respect of initiation fees or monthly dues.
4. The constitution should be ratified by a vote of the members.
5. Officers should be elected pursuant to the constitution.

(See also *Comco Metal & Plastic Industries Ltd.*, [1979] OLRB June 498, and *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472.)

9. It is clear from the evidence adduced before the Board that the first two steps have been fulfilled. As indicated above, a constitution was drafted setting out, among other things, objects which include representation of members in collective bargaining and in all other relations with their employers. That constitution, which was placed before a meeting of employees on February 10, 1985 and approved at that meeting, also sets forth a procedure for electing officers and calling meetings. However, it is equally clear from the evidence that the fifth step described above has not been fulfilled. The failure to elect "two Trustees and a Chief Steward" in accordance with Article 4 of the Constitution might not, by itself, lead the Board to conclude that the applicant is not a trade union within the meaning of section 1(1)(p) of the Act, as the Board has adopted a somewhat flexible approach concerning such matters. See, for example, *The Public Utilities Commission of the Borough of Scarborough*, [1982] OLRB Rep. April 609, in which the Board found that the acclamation of a president, vice-president, secretary, and treasurer, after the other four steps identified in *Associated Hebrew Schools of Toronto*, *supra*, had been fulfilled, was sufficient to make the Utility Workers of Canada an organization which was a "trade union" under the Act, notwithstanding the fact that the election of the full complement of nine officers contemplated by the constitution was not scheduled to occur until the applicant held its first convention. (See also *Comco Metal & Plastic Industries Ltd.*, *supra*; *Gold Crest Products Ltd.*, [1973] OLRB Rep. Aug. 436; *Gold Crest Products Ltd.*, [1973] OLRB Rep. Sept. 469; and *Economical Mutual Insurance Co.*, [1972] OLRB Rep. Feb. 176.) However, the failure to elect (or acclaim) *any*

officers in accordance with the constitution, or to expressly or implicitly authorize to act on behalf of the applicant the persons purportedly elected or acclaimed prior to the adoption of the constitution, is a different matter. The importance of officers in the context of what is now section 1(1)(p) of the Act was described as follows in *J. Harris & Sons Ltd.*, 60 CLLC 16,177:

Whatever the status of a trade union may now be at common law (see *International Brotherhood of Teamsters etc. Local 213 v. Therien*, [1960] S.C.R. 265), the Act, for at least some purposes thereof, clearly treats it as a legal entity separate and distinct from its membership. It may be a party to proceedings before the Board, it may bargain and negotiate for, and enter into collective agreements, and it may prosecute and be prosecuted. It would seem to follow, therefore, that a union's representatives are, at least insofar as some purposes of the Act are concerned, the representatives of the union as a juristic entity, and not merely the representatives of the individual members thereof.

How may a trade union under the legislation, perform its functions, achieve its purposes, or exercise its rights, or discharge its obligations unless it has duly authorized persons by and through whom it may act and be bound? Without officers or other duly authorized persons, the applicant, by its constitution, may only act and be bound through a general convention of members. In this respect its position is somewhat analogous to a corporation which may only act and be bound by and through its officers or agents or its shareholders at a general or special meeting. Without authorized persons to act on its behalf, every act of the applicant would require the sanction of a general convention of members with all the procedural requirements entailed thereby. It is obvious that this would impose such a restriction on its activities that for all practical purposes it would be impossible for it to carry out the purposes of its constitution. ...

Further, it seems implicit in section 55 [now section 84] of the Act and the sections thereof which deal with collective bargaining and the rights, responsibilities and duties of trade unions, that a trade union will have responsible persons to act and make decisions on its behalf. In this regard section 55 provides *inter alia*, that the Board

**...may direct any trade union...to file with the Board...a copy of its constitution and by-laws and a statutory declaration of its president or secretary setting forth the names and addresses of its officers.**

In regard to notices, proceedings before the Board, collective bargaining, conciliation and arbitration, the Act clearly presupposes the existence of responsible representatives to act on behalf of the union. It is obvious also that in order to operate in accordance with its constitution and the legislation, a union must have persons responsible and accountable to the membership for the collection and expenditure of union funds.

It is significant to note that Harris J. of the New Brunswick Court of Appeal in *The King v. The Labour Relations Board*, CCH Canadian Labour Law Reporter, Transfer Binder (1949-54), 15,038 at p. 11,303 refers to a trade union "in the ordinary sense" as "a body with a charter and construction [sic] with properly elected officers."

In that case, persons present at a "general meeting" on August 11, 1959, purported to elect officers. However, the applicant's constitution was not adopted until November 11, 1959. The Board ruled that the purported election of officers prior to the adoption of a constitution was premature:

It is, of course, elementary that the applicant organization could not come into existence until the adoption of its constitution nor could it have officers as such until that time. Any purported election of officers to the applicant organization before the adoption of its constitution would, therefore, be premature. Whatever may have occurred before the adoption of the applicant's



constitution, it is abundantly clear from the evidence that no officers have been elected since that date.

The Board further wrote as follows in that case:

.... We find that as the applicant organization has no officers elected in accordance with its constitution, and as it has not established that the persons purporting to act as officers thereof are otherwise authorized to act as such by the membership, the applicant has failed to prove its status as a trade union under the Act.

A similar approach has been adopted by the Board in numerous subsequent decisions: see, for example, *Abitibi Power & Paper Co.*, [1965] OLRB Rep. Oct. 491; *Borg Fabrics Ltd.*, [1966] OLRB Rep. Dec. 693; *Kitchener Public School Board*, [1967] OLRB Rep. Jan. 789; *Ferritronics Ltd.*, [1969] OLRB Rep. March 1286; and *Dufferin-Peel County Roman Catholic Separate School Board*, [1971] OLRB Rep. Oct. 680.

10. In addition to section 84, a number of other provisions in the Act clearly contemplate that a "trade union" will have officers. For example, section 85(1) requires every trade union, upon the request of any member, to furnish the member with "a copy of the audited financial statement of its affairs to the end of its last fiscal year certified by its treasurer or other officer responsible for the handling and administration of its funds to be a true copy". See also sections 46(3), 66(c), 74, 82(1), 91(1), 92, 98, 99(2), and 101(2). Moreover, it is difficult to envision how the important powers and obligations of a "trade union" which obtains certification under the Act (or otherwise gains bargaining rights for employees) could be exercised or fulfilled without officers elected under its constitution or otherwise duly authorized to act as officers thereof. Thus, the requirement that an applicant have such officers before the Board will find it to be "an organization of employees formed for purposes that include the regulation of relations between employees and employers" is not a mere technicality, but rather is the construction of section 1(1)(p) which, in our view, best ensures the attainment of the objects of the Act according to its true intent, meaning, and spirit (see the *Interpretation Act*, R.S.O. 1980, c. 219, s. 10).

11. In the instant case, it is clear from the evidence that the purported election or acclamation of the persons who are said to be officers of the applicant occurred on January 6, 1985, a month before the applicant's constitution was adopted on February 10, 1985. It is also clear from the evidence that the January 6, 1985 election and acclamations were not subsequently confirmed or ratified. Nor has it been established that Mr. Wansbrough and the other persons who purport to be officers of the applicant have been otherwise authorized to act as officers thereof. In this regard, it is noteworthy that the only evidence concerning further actions taken by the employees in attendance at the February 10 meeting pertains to the aforementioned authorization of Mr. Kirkland to contact the Board and prepare an application for certification.

12. For the foregoing reasons, the Board finds that the applicant has failed to establish that it is a "trade union" within the meaning of section 1(1)(p) of the Act. Accordingly, this application is hereby dismissed.

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**0730-85-R United Steelworkers of America, Applicant, v. Canadian Textiles Screen Prints Limited, Respondent**

**Bargaining Unit - Practice and Procedure - Board in previous case directly receiving parties' evidence and submissions on community of interest - Board not following that practice where managerial status in dispute - Officer appointed as per usual practice**

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *F. W. Murray* and *J. Kennedy*.

**APPEARANCES:** *Brian Shell*, *Phil Falbo* and *Doug Hart* for the applicant; *James E. Bowden*, *William Milton*, *Chris Milton* and *Rick Matsui* for the respondent.

**DECISION OF THE BOARD; July 23, 1985**

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. For the purposes of clarity, the Board notes the agreement of the parties that Adele Milton and Violet Mokerracher are office employees.
5. With respect to the composition of the bargaining unit, the respondent contends that the following persons should be excluded from the bargaining unit on the ground that they exercise managerial functions within the meaning of section 1(3)(b), while the applicant submits that they should be added to the list of employees filed by the respondent and included in the bargaining unit: Emmanuelle Fusca and Frank Grande, who are each classified by the respondent as Head Printer-Foremen; Metro Kozak, who is classified by the respondent as Artist-Foreman; and Joanne Sloane, who is classified by the respondent as Shipper-Foreman.
6. It is the respondent's position that in accordance with its normal practice the Board should appoint a Board Officer to enquire into and report to the Board concerning the duties and responsibilities of those four persons. Counsel for the applicant, on the other hand, requests the Board to expedite the resolution of that matter by receiving directly the evidence and submissions of the parties, after directing them to each prepare and file a statement of all material facts upon which they intend to rely at the hearing. In support of that request, counsel for the applicant noted that the Board adopted that procedure in *Canadian Timken, Limited* (Board File No. 0343-85-R, decision dated June 11, 1985, unreported) in which the Board wrote, in part, as follows:

5. The parties, while agreeing over the description of the bargaining unit, disagreed

over the composition of the unit. They agreed that four persons classified as stock attendant and chief stock attendant were in the bargaining unit. The applicant submitted that John Desmier and Gilbert Clement, classified as order analysts, Lynn Caron, an order data entry clerk and Mary Gaskin, a clerk typist were employees in the bargaining unit while the respondent submitted that they ought [to] be excluded on the basis of the office and sales exclusion in the bargaining unit description. The parties did agree that the resolution of the issue of those employees' inclusion in or exclusion from the bargaining unit depended upon the determination of whether there is a community of interest between them and the employees whom the parties agree are in the bargaining unit.

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8. While the Board's normal practice in the past was to appoint a Labour Relations Officer to conduct a community of interest examination and report back to the Board, the Board was of the opinion in this case, based upon the submissions of the parties, that it should receive directly the evidence and submissions of the parties, rather than appoint a Labour Relations Officer. In order to narrow the issues in dispute and minimize the length of the hearing, the Board adopted the following procedure in this case. The respondent and the applicant were directed to prepare a statement of all material facts upon which they intend to rely at the hearing of this matter and to attach to the statement all documents that may be relevant to the issues in this matter. The parties were advised that the Board, at the hearing of this matter, would not permit either party to adduce evidence to establish any material fact not included in their statements except with leave of the Board. (The Board advised counsel for the respondent that it would be inclined to grant its leave to the respondent to adduce evidence of material facts properly in reply which were not in its statement.)

9. The Board directed the respondent to file three copies of its statement with the Board and deliver one copy of its statement to counsel for the applicant on or before June 20, 1985. The Board directed the applicant to file three copies of its statement with the Board and deliver one copy of its statement to counsel for the respondent on or before July 3, 1985.

10. The Registrar is directed to list this matter for continuation of hearing before this panel of the Board on July 5 and July 12, 1985.

7. While we are by no means insensitive to the applicant's desire to expedite the resolution of the matters remaining in dispute between the parties, and while we recognize that the procedure adopted by the Board in *Canadian Timken, Limited* may be appropriate in some circumstances, such as cases involving community of interest determinations, we are not prepared to depart from the Board's normal practice in the circumstances of the present case. That practice, which is permitted by section 103(2)(g) of the Act, facilitates settlement of such disputes, and minimizes the amount of Board hearing time required to resolve such matters, thereby permitting the Board to adjudicate with greater expedition other pressing matters, such as certification applications in which the applicant cannot be certified on an interim basis under section 6(2) pending the final resolution of the composition of the bargaining unit; section 89 complaints involving matters such as discharges, lay-offs, and allegations of bargaining in bad faith; applications under sections 92, 93, and 135 concerning unlawful strikes and lock-outs; and section 124 grievance referrals.

8. Accordingly, a Board Officer is hereby appointed to enquire into and report to the Board on the duties and responsibilities of Emmanuelle Fusca, Frank Grande, Metro Kozak, and Joanne Sloane.

9. The Board has determined that the applicant's right to certification cannot be affected by the Board's ultimate decision concerning the composition of the bargaining unit. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of



the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on July 4, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

10. Pursuant to its discretion under section 6(2) of the Act and pending the final resolution of the composition of the bargaining unit, the Board hereby certifies the applicant as bargaining agent for all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, and pending the final resolution of the matters in dispute, excluding as well Head Printer-Foremen Emmanuelle Fusca and Frank Grande, Artist Foreman Metro Kozak, and Shipper-Foreman Joanne Sloane.

11. The issuance of a formal certificate in this matter will await the final determination of the composition of the bargaining unit.

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**1528-84-M** United Brotherhood of Carpenters and Joiners of America Local 18, Applicant, v. **Coldmatic-Refrigeration of Canada Ltd.**, Respondent

**Construction Industry Grievance - Reconsideration - Employer not attending hearing despite notice - Union obtaining award seeking execution - Board not permitting reconsideration application subsequently made - Commenting on effect of delay of 6 months from date of award in filing reconsideration application**

**BEFORE:** Paula Knopf, Vice-Chairman, and Board Members H. Kobryn and W. G. Donnelly.

**DECISION OF THE BOARD;** June 11, 1985

1. This an application by the respondent, Coldmatic-Refrigeration of Canada Ltd. (Coldmatic), for the Board to exercise its power, pursuant to section 106(1) of the *Labour Relations Act*, to reconsider its decision of October 5, 1984 in this matter.

2. The particulars offered to support the request for reconsideration are contained in an affidavit of George Zafir. Mr. Zafir is the President of the respondent.

3. The business of the respondent is the manufacture and installation of coolers. Mr. Zafir explained that in or about 1980, the respondent was engaged in the manufacture of coolers. In addition, Mr. Zafir was an officer and shareholder of another company known as G. & G. Parkdale Refrigeration Ltd. together with a Mr. George Fevgas. However, at this time, the business relationship between the two men is at an end and G. & G. Parkdale Refrigeration is an inactive company.

4. Mr. Zafir's affidavit also explains that although a short-form voluntary recognition

agreement dated August 15, 1980 exists between the applicant and the respondent, the agreement contains the signature of Mr. Fevgas purportedly on behalf of Coldmatic although Mr. Fevgas was at no time an officer, director or person entitled to execute contracts on behalf of Coldmatic. Mr. Zafir claims to have been unaware of the existence of the short-form agreement until he was served with a copy of the October 5, 1984 decision of this Board together with the Writ of Seizure and Sale obtained by the Union early in 1985. Mr. Zafir also presents documents in his affidavit which he says indicate that the applicant union dealt with G. & G. Parkdale Refrigeration and Coldmatic interchangeably in their correspondence from January, 1982 to February 28, 1985 despite the fact that no application had ever been made under subsection 1(4) of the *Labour Relations Act* involving the two companies.

5. Mr. Zafir gives the following as the reason why no one appeared on behalf of Coldmatic at the proceedings held on September 26, 1984:

Although the respondent was served with notice of the proceedings leading to a decision herein, the respondent did not appear at the hearing or retain counsel with respect to this matter inasmuch as I had no knowledge of any basis on which the applicant could claim to be a party to a collective agreement with the respondent.

6. After obtaining the decision of this Board in this matter, the Union obtained a certificate from the Supreme Court of Ontario and a Writ of Seizure and Sale against Coldmatic in order to enforce the award. Upon receiving these, the respondent launched this application for reconsideration. The bases he has given for the request are the following:

1. That Mr. Fevgas had no authority to contract on behalf of the respondent and that the respondent was unaware of this fact;
2. that the work in question, as described in paragraph 6 of the Board's original award in this matter, did not fall within the craft jurisdiction of the applicant; and
3. that the work in question actually required only 32 man hours of work and not 160 man hours as set out in the Board's decision.

7. The applicant union has opposed the request for reconsideration. With regard to the claim that Mr. Fevgas had no authority to bind the respondent to the Carpenters' Provincial ICI agreement, counsel for the applicant argues that that is a matter which ought to have been raised at the hearing on behalf of the respondent. In any event, the Union expressly denied that Mr. Fevgas lacked the authority to sign the agreement or that the agreement is not binding on the employer. In support of this, the Union points out that Mr. Zafir's affidavit contains a business card of the respondent Coldmatic which identifies Mr. Fevgas as Coldmatic's supervisor. Further, the Union asserts that in 1980 when the agreement was signed, Mr. Fevgas was in the respondent's employ and the person in charge of the respondent's job site operation. Further, the evidence before the Board, and as accepted in its decision, was that on three instances since the signing of the collective agreement the respondent has made remittances to the Health and Welfare benefits of the applicant pursuant to the agreements. The Union relies on the decisions of *Vic Starchuk and Associates Inc.*, [1980] OLRB Rep. April 516 and *Inspiration Ltd.*, [1967] OLRB Rep. Sept. 561 in support of the proposition that an employer's on-site representative can bind an employer to a collective agreement where it is held out that he has the authority to do so and the union reasonably believes him to have that authority.

Further, even if no such authority existed, the signature can be ratified by the conduct of the employer by honouring the collective agreement through, for example, the making of remittances towards a welfare plan. (See *Vic-Starchuk and Associates Inc.*, *supra*.)

8. Further, the Union argued that the documentation presented by the respondent in support of the proposition that the applicant has dealt interchangeably with Coldmatic and G. & G. Refrigeration does not in fact relate to the applicant but instead to other locals of the Carpenters' union.

9. The Union also argues that any claim that the work in question does not fall within the applicant's craft jurisdiction ought to have been made at the initial hearing and that the Board ought not to entertain such submission at this time. In any event, it was said that the submission is in contradiction with the Board's finding in paragraphs 4 and 5 of the original decision that the work which is the subject of this grievance was previously performed by the respondent on three separate occasions.

10. Finally, the Union argues that the respondent's claim that the number of man hours required for the jobs ought to have been raised at the initial hearing and no suggestion is made why the evidence which was accepted by the Board from the applicant ought not to have been believed.

11. In conclusion, the Union stressed that although the Board's initial decision was issued on October 5, 1984, no request for reconsideration was forthcoming until April 19, 1985. In the meantime, the applicant has attempted to enforce the Board's decision through the Supreme Court. It is the Union's allegation that the respondent is going "to great lengths" to put the applicant to expense, time and frustration in enforcing this award.

### The Decision

12. The Board's practice and policy regarding the granting of a reconsideration can be characterized as falling into two general camps. First, the Board will not grant a reconsideration generally unless a party shows that it can adduce new evidence which was not previously obtainable by reasonable diligence and that evidence would, if adduced, be practically conclusive. Or, the Board will not grant a reconsideration unless the party requesting it can satisfy the Board that it had no opportunity to raise those representations or objections previously. (See *Ottawa Truck Centre*, [1983] OLRB Rep. Jan. 139, *Cochrane Temiskaming Resource Centre*, [1983] OLRB Rep. Feb. 222 and *P. W. Bradley*, [1983] OLRB Rep. June 865.)

13. There is no question in this case that the respondent had adequate notice of the original hearing. This is admitted by the respondent through Mr. Zafir's affidavit. What simply happened in this case is that the respondent chose not to attend. Thus, it cannot be said that the respondent had no opportunity to raise his objections or positions earlier or at the initial hearing.

14. Further, there is no suggestion that the evidence which the respondent seeks to adduce was not available to it or known to it at the time of the original hearing in September



of 1984. Neither can it be said, given the position and the allegations of the Union, that the evidence which the respondent seeks to present can be considered to be conclusive of the issues which the Board would have to deal with.

15. The Board's concerns in cases like this have been expressed in the *Detroit River Construction Ltd.* case, 63 CLLC 16,260:

While depending upon the circumstances of the case and the applicable principles of natural justice, the Board ought not to be as strict or as technical as a Court. It must nevertheless, in our view, recognize the necessity for and apply some principle of finality to its decision. It stands to reason that when a party has gone through the ordeal, expense and inconvenience of a hearing and obtained a decision in its favour, that he should not be deprived of the benefit of that decision except for good cause. The Board ought not to encourage a practice whereby one party can remain silent throughout a hearing, and after he has discovered the weak points in his adversary's armour be permitted to exploit them by calling evidence at another and later hearing which he could and should have presented at the original hearing. If it were otherwise, the door would be open in any given case to ceaseless and neverending hearings each serving as a prelude to the next *ad infinitum* and no one could safely rely on any decision as settling the rights of the parties.

In the case at hand, the principles in the *Detroit River Construction* case, *supra*, are directly applicable. The Board cannot encourage a practice whereby one party can, being aware of the scheduling of proceedings, choose to not attend and then, after discovering that the award has been made against him, seek to reopen the proceedings when no compelling reason to do so has been presented.

16. In addition, the Board must express its concern about the timing of this application for reconsideration. It is clear from the materials presented by the respondent that this application was only made well after attempts were being pursued by the respondent to prevent the Supreme Court's enforcement of the Board's original award. While there is no time limit in the Act which applies to applications for reconsideration, the Board, in exercising its discretion, cannot fail to be concerned about an application made six months after the original award and a number of months after the award came to the unsuccessful party's attention. While this in itself is not a reason for denying the application for reconsideration, it is a factor which must be commented upon.

17. On the basis of the foregoing, the application for reconsideration is denied.

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**3484-84-R** United Food and Commercial Workers International Union, AFL, CIO, CLC, Applicant, v. **Delft Blue Farms Incorporated**, Grodell Foods Limited, Grober Farms Ltd., Respondents, Group of Employees, Objectors

**Certification - Petition - Management inviting employees to meetings - Opposition to unions expressed and formation of employees' committee suggested - Statements beyond bounds of freedom of expression - Petition circulated in wake of meetings given no weight**

**BEFORE:** *S. A. Tacon*, Vice-Chairman, and Board Members *J. A. Ronson* and *W. F. Rutherford*.

**APPEARANCES:** *Martin Levinson* and *V. Gentile* for the applicant; *Marc J. Somerville, Q.C.*, *Ian S. Campbell*, and *Jerry Bartelse* for the respondents; *Garth Owens* for the objectors.

### **DECISION OF THE BOARD;** July 25, 1985

1. By decision of the Board dated May 31, 1985, a Board Officer was appointed to inquire into and report back on the duties and responsibilities of three individuals, C. Soares, M. Silveira and B. Patterson. This decision deals with the other issues in this certification application.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Further, the parties, except for the issue of the exclusion or inclusion of the three above-named persons, have agreed on the description of the bargaining unit. Having regard to that agreement, the Board finds that all employees of the respondents in the Municipality of Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining. It is appropriate to note here that the respondents agreed that Delft Blue Farms Incorporated, Grodell Foods Limited and Grober Farms Ltd. were related employers within the meaning of section 1(4) of the Act. Accordingly, the Board declares that the three named companies constitute one employer for the purposes of the Act.

4. The Board notes that the applicant had submitted an earlier certification application with respect to Delft Blue Farms Incorporated, Board File No. 3264-84-R. The applicant had requested leave to withdraw and in accordance with the Board's usual practice, the application was dismissed by decision dated April 3, 1985. The present application was filed March 29, 1985.

5. The Board does not consider it necessary to here reproduce the various oral rulings made during the hearing. The Board notes, though, that counsel for the respondents objected to proceeding with oral argument at the conclusion of the evidence. Mr. Somerville, Q.C., counsel at the earlier proceedings, was unable to attend on the day scheduled for continuation. Mr. Campbell attended in his stead. Counsel for the respondents wished written argument; counsel for the applicant and Mr. Owens for the employee objectors preferred oral argument. The Board considered the submissions of the parties and adopted the following procedure: the

applicant would proceed first followed by the petitioner, both with oral argument; counsel for the respondents would submit written argument with the Board by June 24, 1985; no reply was to be given orally or in writing by any party.

6. In addition to Soares, Silveira and Patterson, the applicant challenged the inclusion of S. Wade-Briton to the schedules. The applicant was also informed of its position with respect to lost cards.

7. In support of its application, the applicant filed 18 membership cards, 17 of which coincided with the 26 names on the respondents' list. The cards were gathered by more than one collector, indicated the payment and receipt of \$1.00, were properly dated, bore original signatures and had countersigned receipts. A Form 9 Declaration was filed attesting to the authenticity of the membership evidence.

8. One statement of desire was also filed with the Board containing 7 names, 5 of which coincided with the names of those who had previously signed membership cards (and excluding one challenge to the employer's lists). Finally, there was one revocation or reaffirmation filed in support of the applicant. It is not necessary for the Board to deal further with this reaffirmation since, even if proved voluntary, there is not sufficient overlap between the person signing the revocation and those signing the statement of desire in opposition to the applicant that the Board would not undertake an inquiry into the circumstances surrounding the origination and circulation of the statement of desire. That statement of desire will be considered further, however, because, if proven voluntary, it would raise sufficient doubt concerning the continued support for certification of the applicant, by a sufficient number of employees who also signed membership cards, that the Board would generally exercise its discretion under section 7(2) of the Act to direct a representation vote notwithstanding the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time.

9. The Board heard testimony from some eight witnesses: Garth Owens for the employee objectors; Luis Pacheco, Michael Verkerke and Tina Connors for the applicant; Gerry Bartelse, Arie Nuys, Claudio Soares and Barry Patterson for the respondents. The Board assessed the testimony of the witnesses according to the usual criteria, including the consistency of their evidence, their demeanour while testifying, the firmness of their memory, their ability to resist the influence of interest to modify their recollections and what seems to the Board to be reasonably probable when the circumstances and the testimony of the witnesses are considered.

10. The Board does have some specific comments about the relative credibility of the witnesses. It is not unusual that the testimony of various witnesses differs given the passage of time between the date events occur and the hearing and the fact that witnesses are often not detached observers but participants in the events themselves. In this case, the Board is inclined to regard most of the witnesses as trying to respond to questions to the best of their recollections and to attribute most of the discrepancies to factors such as differing ability to remember events, facility in expression, etc. Moreover, many of the minor discrepancies did not concern matters of critical import to the Board's determination as to the voluntariness of the petition. With respect to Bartelse's testimony, however, the Board considers that his account of events stands in such contrast to that of other witnesses, including Nuys, a management colleague, that his evidence must be disregarded as not credible. To give but one example,

Bartelse repeatedly insisted that the reason for the first meeting was to respond to low morale among employees, as allegedly reported by a government inspector, and that he was not really concerned with the rumours of “union talk” at all. Yet, Nuys readily acknowledged that “union talk” was the reason for the March 6th meeting, did not mention the “morale” problem and even his (Nuys’s) version of the content of the various meetings made it perfectly clear that the “union talk” was of prime concern. Apart from Bartelse’s testimony, the other accounts of the meetings of March 6th and 11th, in particular, are relatively consistent. And, while there were some differences as to which member of management said what, there was substantial agreement as to the content of management’s statements at those meetings. In the context of the foregoing, then, the Board makes the following findings of fact.

11. Owens testified the idea for the petition came from Gentile, a union organizer, in response to his question about whether the union organizing drive could be stopped. Gentile replied that a petition could be circulated but, if that happened, things would be all right if every one stuck together. The Board accepts Owens’ testimony as to the origination of the petition for several reasons. Owens was a candid witness, in the Board’s view, who attempted to respond to questions in a straightforward manner although Owens did have considerable difficulty at times in expressing himself clearly. Further, Pacheco did recall this subject being raised in conversation in circumstances when the three were present and, finally, Gentile himself was not called to contradict Owens on this point.

12. Several statements of desire were filed in respect of the first certification application, i.e., Board File No. 3264-84-R. Owens testified he drafted or assisted in drafting the heading on several of these. Owens stated he also drafted the heading on the petition currently before the Board, although he had discussed the petition process with his brother and had read the Board’s brochure and guide to the *Labour Relations Act*. The Board also accepts Owens’ testimony on these points. The Board regards the wording on the petition as the product, not of a professional at law, but an individual adopting legal-sounding phraseology in the view that a petition is a legal sort of document.

13. The signatures on the statements of desire in that first certification application, with one exception, were gathered during non-working hours or breaks outside the plant. The signatures on the second statement of desire were all obtained during non-working hours or breaks behind the plant buildings and in the adjacent parking lot. Owens stated everyone was aware of what he was doing because of the small size of the plant but that he did not talk to management about the petition nor pressure any of the employees to sign. The Board does not regard the petition or Owens’ credibility as weakened by Owens’ statements to Verkerke during working hours that he wished to discuss the petition at break and, later, changed this planned meeting to lunch time. The contact with Verkerke was momentary at best and stands in contrast to the sort of petition discussions on company premises during working hours which the Board has censured in the past. Similarly, the observed (but not overheard) conversations with two other employees were not lengthy and were in the course of Owens’ performance of his regular duties.

14. All signatures were collected on the same day. Owens had exclusive possession of the petition throughout and mailed the petition to the Board himself after working hours.

15. The petition, however, did not take place solely in the context of the union organizing drive. Management became aware of the union activities and convened three



meetings of employees, one on March 6 and two on March 11, 1985. With respect to March 6, Soares and Patterson were instructed to advise the employees that there would be a "voluntary" meeting after working hours which the employees were free to attend if they wished. Bartelse (managing director), Nuys (comptroller), Tabatchnik (plant manager), Soares, Patterson and a number of employees attended. According to Nuys, the meeting on the 6th was called to convey management's point of view to employees and find out the "reason why there was union talk" at the plant.

16. Nuys commenced by stating the meeting was voluntary and employees could remain or leave as they chose. He continued that there were "rumours of union talk and we wanted to sit down and find out why and what we could do together instead of having third party involvement" (to quote Nuys). Bartelse expressed similar sentiments. Initially, no employees responded. Management was then asked to leave, did so and returned some 15 minutes later. The "foremen" left with senior management as well. At this point, a number of employees expressed concerns about wage levels and inequities, job security, the attitude of Soares, etc. That meeting ended with Bartelse's comment that management would see what it could do and get back to the employees on the following Monday.

17. Bartelse and Nuys were out of town for the remainder of that week. On their return on Monday, they found the Board notice of the certification application. Management decided to proceed with the meetings as planned but to inform the employees that there could be no further discussions about improvements to wages, etc. since the application for certification had been filed. Nuys stated that, from his reading in the area, he felt it would be an unfair labour practice to make any offers to employees at this point. There was also evidently some discussion with counsel about the situation at some time between the meetings on the 6th and the 11th.

18. In fact, because the employees in the three companies finished work at different times that day, two separate meetings were held. Again, Soares and Patterson informed employees that a "voluntary" meeting would be held after work.

19. At the first meeting, Bartelse, Tabatchnik, Nuys and Soares attended plus three employees, Lima, Pume and Conners. Verkerke was present initially but was asked to leave by Tabatchnik, apparently because Verkerke was working at the plant pursuant to the Ontario Career Action Programme (OCAP). This meeting was relatively brief. Bartelse expressed his strong views in opposition to unions, words to the effect that he didn't get along with unions, that he didn't want third parties telling him what he could or couldn't do with his business, that it was too late to discuss matters further with employees because the certification application was filed, and such like. Tabatchnik suggested the employees form a committee among themselves, that they would probably get a lot further negotiating that way than with a union. Management also referred to the current practice of paying employees for the standard period even if work finished early and suggested things might be different if there was a union. Nuys testified he told the employees that, as the notice of the application for certification had been received, management couldn't discuss anything about salaries or benefits at this time but that management still felt strongly that they would rather deal directly with the employees rather than through a third party. The meeting ended with management referring to the green Board notices and stressing that the employees had until March 15th, the terminal date, to make up their minds.

20. The second meeting on the 11th was attended by Bartelse, Nuys and Tabatchnik



and approximately eight employees. Bartelse again vigorously expressed his opposition to unions, that the company couldn't offer the employees anything since the application was filed, that the union could make extravagant promises but had to deal with him and "he and unions didn't get along". Management again referred to a internal committee of employees to conduct negotiations rather than a union. The meaning of the terminal date was explained in no uncertain terms. As noted earlier, there was some dispute, which the Board does not find it necessary to resolve, as to precisely which member of management made which comments. Nuys himself testified he commented that unions couldn't guarantee job security, referring to the closure of the Burns plant and UAW layoffs. According to Nuys, Bartelse stated he came to Canada to start a business to get away from some problems he experienced in Europe, that he and unions just don't get along. Nuys agreed the subject of management negotiating with an employee committee was raised. Nuys also stated he told the employees this was a democratic country, they had a free choice, they should consider all the factors and had until the terminal date to decide. Nuys further acknowledged he explained the significance of the terminal date, i.e., as the date for filing statements in opposition to the union.

21. The Board notes two other matters. There was disagreement as to the precise content of a conversation between Soares and Verkerke about the latter's plans to meet with a union organizer. The Board does not consider it necessary to resolve this issue in view of the Board's decision *infra*. Secondly, there was an alleged conversation between Verkerke and Nuys in which Verkerke was assured that his union membership would not be in factor in the decision whether or not to retain Verkerke post the OCAP period. Nuys was unsure of the timing of the conversation but placed it closely before or after the terminal date. In the Board's view, after reviewing the evidence, it is likely this followed the terminal date. In any event, the conversation had no effect on the petition and, hence, need not be dealt with further.

22. Counsel for the applicant reminded the Board that the present application for certification, filed April 12, 1985, was preceded by another application, dated March 5, 1985 (Board File No. 3264-84-R) in which the sole respondent (Delft) took the position that it, Grober and Grodell were related employers within the meaning of section 1(4) of the Act. The applicant sought leave to withdraw; the application was dismissed by decision of the Board dated April 3, 1985. The representative of the employee objectors in the first application also filed a petition in respect of the second application. Counsel's first submission, then, was that, should the first petition be "tainted", that "taint" would likewise apply to the second petition; *N-J Spivak Limited*, [1977] OLRB Rep. July 462 was referred to in support. Secondly, counsel argued that the Board should give no credence to the testimony of the petitioner for several reasons: the explanation that the petitioner got the idea for the petition from Gentile, a union organizer, was not plausible; Owens' insistence that he did not approach employees about the petition during working hours conflicted with the testimony of Verkerke and the latter's evidence should be preferred; the actual words used in the heading of the petition could not be described as "usual language" and would have required legal assistance; the petitioner's failure to recollect much of the March 6th and 11th meetings contrasted with the testimony of several other witnesses also at the meeting and constituted an attempt to protect the respondents. Thirdly, counsel contended that a petition circulated subsequent to meetings called by management at which management expressed opposition to a union should be discounted regardless of whether the actual statements by management constituted a violation of section 64 of the Act. *New Ontario Dynamics Limited*, [1975] OLRB Rep. Nov. 845; *The Intelligencer*, [1976] OLRB Rep. Mar. 120; *Parnell Vending Limited*, [1965] OLRB Rep. Apr. 5 were cited in support. Finally, counsel asserted that the statements made by management at

those meetings did amount to a violation of the Act. In this regard, counsel submitted that the evidence of Bartelse was just not credible. The testimony of the applicant's witnesses and Nuys, however, was not tremendously different. Management had clearly expressed opposition to the union, invited the formation of a "employees' committee" and reminded employees that they had until the terminal date to change their minds about supporting a union. Further, the respondents did not have a pattern of holding such meetings. In the circumstances, then, counsel argued the petition should be found not voluntary; *New Surpass Petrochemicals Limited*, [1966] OLRB Rep. Mar. 892 was referred to in support.

23. The representative of the employee objectors, Owens, submitted that the petition was voluntary. In support, he pointed to the testimony of Verkerke, wherein Verkerke stated he was allowed to read the petition and to decide whether or not to sign. With respect to the origination of the petition, Owens affirmed his testimony that the idea came from Gentile. Owens stated that Pacheco acknowledged that he heard the question and answers regarding possible opposition to the union. While Pacheco did say that he did not hear who made these statements, Owens emphasized that it was already established that only three persons (Pacheco, Gentile and Owens) were present at the time. Finally, Owens reiterated that he had prepared the statement of desire himself, without legal help.

24. Counsel for the respondents, by way of written submissions, reviewed the evidence as to the origination and circulation of the petition. Counsel submitted that Owens' explanation was credible, that there was no evidence of management involvement, that Owens would not be perceived as identified with the interests of management and, thus, the petition was voluntary. Counsel rejected submissions made by counsel for the applicant in oral argument that the meetings held by the respondents, whether *per se* or with consideration of the statements at the meetings, rendered the petition involuntary. It was argued that *New Ontario Dynamics, supra*, was distinguishable on the facts and on the basis that the respondents' meetings were voluntary and not held on company time. Likewise, counsel asserted *The Intelligencer, supra*, and *Parnell Vending, supra*, were distinguishable on their facts. To summarize, counsel contended that, to find management meetings would render the petition involuntary on a *per se* basis, would ignore the employer's right of free speech guaranteed in section 64 of the Act. With respect to the management statements at the meetings, counsel reviewed the evidence, stressing that the first meeting was held prior to knowledge of an impending application for certification. Further, counsel argued that Bartelse and Nuys were credible witnesses and there was nothing in the statements made which would result in a finding that the petition was involuntary. No cases were referred to in support.

25. It is well settled that the employee objectors bear the onus of proving that the statement of desire constitutes a voluntary expression of the true wishes of the employee signatories. As stated in *Radio Shack* [1978] OLRB Rep. Nov. 1043:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural

desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.”

26. The Board is satisfied that Owens prepared and circulated the petition without direct management involvement. Nor does Owens himself hold a position comparable to that of lead hand, for example. In such cases, the Board has been cautious in balancing the rights of individuals in the bargaining unit to circulate a petition against the organizational reality that a “lead hand” has a special relationship with management and employee perceptions are particularly important in this context: see *Cornelius Manufacturing*, Board File No. 1704-84-R, December, 1984, unreported; *Burlington Northern Air Freight*, Board File No. 1198-84-R, November, 1984, unreported; *Dad’s Cookies*, [1976] OLRB Rep. Sept. 545; *F.W. Woolworth Co. Limited*, [1982] OLRB Rep. May 797.

27. The petition, however, did follow several meetings between management and employees, the first meeting on March 6th amidst “rumours” of a union organizing drive and two more on March 11th, immediately after the Board notice of the certification application was received by the company. Management regarded those meetings as “voluntary”, as an opportunity for the company to express its views. The Board does not agree with such a benign characterization of those gatherings.

28. An employer is not required to remain neutral in the face of a union organizing drive. Section 64 of the Act upholds an employer right of “free speech”, provided coercion, intimidation, threats, promises or undue influence are not utilized. As stated in *Dylex Limited*, [1977] OLRB Rep. June 357 at para. 19:

... Where the difficulty inherently arises, however, is in trying to define the line at which an expression of views by an employer becomes “coercion, threats, promises or undue influence.” In seeking to establish where the line lies the Board starts with the presumption that employees recognize that employers generally are not in favour of having to deal with employees through a trade union, and that therefore it ought not to surprise them when their employer indicates that he would prefer it is they voted against a trade union. Following from this the Board takes the view that an invitation to employees from their employer to vote against a trade union, in the absence of any surrounding facts or circumstances which would cause the employees to place undue emphasis on such statements, does not constitute undue influence within the meaning of section 56 [now section 64]. (See, *Playtex Limited*, [1972] OLRB Rep. Dec. 1027.) On the other hand, however, the Board is also cognizant that an employee may be peculiarly vulnerable to employer influences. This point is clearly brought out in the decision of the Canada Labour Relations Board in the *Taggart Service Limited* case [(1964) CLLR Transfer Binder ‘64-’66, 16,015 at page 13,055] the following excerpt from which was cited with approval by this Board in the leading case of *Bell & Howell Ltd.*, [1968] OLRB Rep. Oct. 695 at p.706:

An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However, he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees



and which derive from the nature and extent of his authority as employer over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.

29. Management seeking to express their views, then, must exercise caution in the manner and forum which is chosen to communicate those opinions. If the vehicle selected is a meeting to which employees are “invited”, the management must be even more meticulous and prudent about its statements. A meeting is not “voluntary” merely because it is so labelled. The Board must have regard to all the circumstances, including the size of the bargaining unit. Where, as here, there are relatively few employees, the impact of employer statements, the likelihood of coercion and intimidation, particularly of the subtle kind, is greatly increased. Again, it is useful to refer to the following passage from *New Ontario Dynamics*, *supra*, at para. 16:

We also note that the holding of a meeting prior to the origination of an opposition petition has traditionally been viewed with suspicion by the Board. It is for those in support of the document to satisfy the Board that it represents a voluntary expression of wishes and the Board has often dismissed petitions originating after a meeting of this kind. (See *Bulk-Lift Systems Limited* [1961] OLRB Mthly. Rep. Mar. 431; *Canadian Mouldings Ltd.* [1967] OLRB Mthly. Rep. Nov. 743; *General Markets Limited* 62 CLLC 16,245; *Travelaine Trailer Manufacturing Ltd.* [1970] OLRB Mthly. Rep. Nov. 829; *Parnell Vending Limited* [1965] OLRB Mthly. Rep. Apr. 5; *Hayes Steel Products* [1964] OLRB Mthly. Rep. Apr. 30.) Because of the delicate nature of the employer/employee relationship described in *Pigott Motors (1961) Limited*, 63 CLLC 16,264, such meetings convey the anti-union sentiments of the management regardless of their content and, because of this, tend to taint the following efforts of employees who decide to oppose the application. In fact the very formality of holding such meetings demonstrates an employer’s concern, and may, in the eyes of the employees, align with management those employees subsequently circulating a petition. And it is a well known principle that the Board will dismiss a petition that has been circulated in circumstances where it would reasonably appear to the employees that those circulating the petition have the support and approval of management. (See *Rubbermaid (Canada) Limited* [1967] OLRB July 336.

30. Counsel for the applicant submitted that the holding of such meetings is *per se* a contravention of the Act, regardless of the content of the management statements. The Board is hesitant to accept such a broad proposition, particularly in light of the company’s right to freedom of expression as also set out in the Act. Moreover, in the instant case, this submission need not be resolved given that the Board regards the actual statements by management as clearly exceeding the limits of free speech.

31. The March 6th meeting, called amidst rumours of union organizing activity, was the first meeting of employees ever called by management. Employee grievances were solicited; management conveyed the impression that the grievances would be responded to at the follow-up meeting scheduled for March 11th. On March 11th, however, management indicated that nothing could be done to improve wages, benefits, etc. because of the certification application. Management may not have sought legal counsel on this point or may have relied on their readings in the field. Employees, however, to paraphrase the comment in the *Globe and Mail* case, [1982] OLRB Rep. Feb. 189, are not likely to miss the inference that it is the employer who confers or promises, or, may deny benefits, unless its wishes are accommodated (see also *Parnell Vending*, *supra*).

32. Moreover, there was reference by management at the March 11th meetings to the



formation of an employees' "committee" as an alternative to the union. Such proposals or suggestions have been repeatedly censured by the Board as constituting unlawful interference: see *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564; *New Surpass Petrochemicals, supra*; *Homeware Industries Limited*, [1981] OLRB Rep. Feb. 164; *Upper Canadian Furniture Limited*, [1981] OLRB Rep. July 1016; *Primo Importing and Distributing Co. Ltd.*, [1983] OLRB Rep. June 959.

33. The Board regards management's statements opposing unions as going beyond that which would be "expected" (see *Dylex, supra*). Those statements, in the surrounding circumstances, cannot be regarded as employer "opinion"; they were coercive and intimidatory. It is one thing for management to state its opposition to a union. It is quite another for management to repeatedly and vociferously denounce "third party" interference in its business, to stress that unions could not guarantee job security by pointing to a recent closing of a large meat packing plant in the area, to state unequivocally that this management just "didn't get along" with unions and then "suggest" that employees could form an "employee committee" instead of a union and "inform" employees that they had until the terminal date to weigh the factors and, if they so "chose", to file a statement with the Board in opposition to the union. The vulnerability of employees to employer influences has been noted in *Dylex, supra*, in the passage set out earlier in paragraph 28 above. In the instant case, management played upon that vulnerability in a less than subtle manner. Both management witnesses considered the meetings as "voluntary", as opportunities for the company to "inform" the employees of management's opinions. In the Board's view, however, no reasonable employee would have been under any illusions whatsoever as to the course of action management wished their employees to follow.

34. The Board would also note, in view of counsel for the respondents' submission that the meetings were not on company time, that the company practice was to pay employees until the formal end of shift although they could leave once the work was finished. It appears that the March 6th and at least the first of the March 11th meetings would be on "paid time", although after that day's work was finished. However, in the Board's view, nothing turns on the issue of whether the meetings were or were not "on company time" given the other circumstances and the content of the management statements.

35. Counsel for the applicant referred to *N-J Spivak, supra*, for the proposition that, in a certification application, a "tainted" first petition carries over to a subsequent petition. In this case, it is not necessary to pursue this argument. Rather, the "second" petition, i.e., that statement of desire currently before the Board, was sufficiently proximate to the meetings of March 6 and March 11 to be directly "tainted". The Board simply does not regard a petition circulated in the wake of management's conduct at the March 11th meetings, in particular, as a voluntary expression of the true wishes of the employees. Thus, the Board declines to place any weight on the petition or regard that statement of desire as casting doubt on the membership evidence filed by the applicant.

36. To recapitulate, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondents in the bargaining unit at the time the application was made, were members of the applicant on April 22, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

37. There remains the issue of the status of the three persons named in paragraph 1 as excluded from or included in the bargaining unit. The Board has determined, however, that the applicant's entitlement to certification does not depend upon the ultimate resolution of that dispute. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, certifies the applicant as bargaining agent for all employees of the respondents in the Municipality of Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period and, pending the final resolution of the status of C. Soares, M. Silveira and B. Patterson, excluding these three as well.

38. A formal certificate must await the final determination of the remaining matter in dispute.

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**2093-84-U; 2094-84-U Dominion Paving Limited** Complainant, Labourers' International Union of North America, Local 183, International Union of Operating Engineers, Local 793, Amalgamated Transit Union, Local 113, Michael Reilly, Frank Spera, John Ricciuto, James Carruthers and Roy Hinds, Respondents

**Evidence - Practice and Procedure - Complainant calling respondent as witness - Seeking to cross-examine on basis of new Rules of Practice - Whether Board exercising discretion to adopt analogous rule - S. 9 of Ontario Evidence Act not preventing use of witness' answers against him in same proceeding**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *B. L. Armstrong* and *I. M. Stamp*.

**APPEARANCES:** *William S. Challis* and *Frank BelCastro* for the complainant; *S. B. D. Wahl*, *M. O'Brien* and *E. Ford* for Labourers' International Union of North America, Local 183 and International Union of Operating Engineers, Local 793; *H. M. Pollit* for Amalgamated Transit Union, Local 113, *James Carruthers* and *Roy Hinds*.

**DECISION OF THE BOARD;** June 26, 1985

1. This is a complaint under section 89 of the *Labour Relations Act*, together with an application under section 135(1) of the Act, alleging that the named respondents have unlawfully picketed a job site upon which the complainant was carrying out work for the City of Toronto.

2. The complainant in the course of proving its case has called as a witness Michael Reilly, one of the individuals named as a respondent in these proceedings, and an officer of the respondent Local 183. The complainant has, part way through its examination-in-chief, sought to cross-examine Mr. Reilly, and asserts that it is entitled to do so as a matter

of right. In putting forward this position, the complainant relies upon section 53.07 of the new *Rules of Civil Procedure*, O. Reg. 560/84, which provides in part:

- “53.07(1) A party may secure the attendance of a person who is,
- (a) an adverse party;
  - (b) an officer, director or sole proprietor of an adverse party;
  - • •
  - as a witness at a trial...
- (3) A party calling a witness referred to in sub-rule (1) may cross-examine him or her.”

Those Rules are stated to apply only to civil proceedings:

- “1.02(1) ...
- (a) in the Supreme Court of Ontario and the District Court of Ontario; and,
  - (b) in the Surrogate Courts of Ontario, as provided in the *Surrogate Courts Act*,
- except where a statute provides for some other procedure.”

The complainant argues, however, that the Board ought to exercise the discretion given it in evidentiary matters in favour of adopting a rule akin to 53.07 for its own proceedings.

3. Section 103(2)(c) provides:

- “103.-(2) Without limiting the generality of subsection (1), the Board has power,
- • •
  - (c) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not.”

Notwithstanding this latitude, the Board, by and large, as pointed out in, for example, *T.R.S. Food Services Limited*, [1976] OLRB Rep. April 154, at 155,

“... follows the basic rules of evidence in an attempt to conduct ordered and fair hearings and has regard to the pronouncements of the courts with respect to evidentiary matters.”

In addition, the Board recognizes the importance of acting on evidence which has “cogency in law”. See *Reimer Overhead Doors Ltd.*, [1984] OLRB Rep. Oct. 1493; *R. v. Barber*, [1968] 2 O. R. 245 (Ont. C.A.). The Board is always mindful, therefore, of the ordinary rules of evidence, as developed by the Courts at common law. The *Rules of Practice*, on the other hand, are specific statutory enactments which are often inconsistent with the common law, and which do not apply, by their own terms, to proceedings before this Board. Whether the Board considers any of the *Rules of Practice* an appropriate guide in one of its own proceedings is a matter for it, in its discretion, to assess and decide.

4. It is the view of the Board that section 53.07 is *not* appropriate for adoption in these proceedings so as to allow the complainant to call and then cross-examine an adverse party



as of right. It is to be noted that sections 53.01(2) and (4) of the *Rules* pointed out by counsel for the respondent Michael Reilly stands much closer to the existing state of the common law and provide:

“53.01

Leading Questions on Direct Examination

(4) Where a witness appears unwilling or unable to give responsive answers, the trial judge may permit the party calling the witness to examine him or her by means of leading questions.

While at the same time:

Trial Judge to Exercise Control

(2) The trial judge shall exercise reasonable control over the mode of interrogation of the witness so as to protect the witness from undue harassment or embarrassment and may disallow a question put to a witness that is vexatious or irrelevant to any matter that may properly be inquired into at the trial.”

There appears little doubt that at common law the trier of fact has always had a discretion to permit cross-examination or leading questions of one’s own witness where that becomes necessary “in order best to answer the purposes of justice.” *Bastin v. Carew*, Exeter, August 19th, 1824. The *Canadian Encyclopedic Digest*, 4th edition, states at 57-961:

“On cross-examination of an opponent’s witness, ordinarily no question can be objected to as leading. *The same rule applies where a witness called by the examining party is*, in fact, hostile or *biased against his cause*, or is, for any other reason, unwilling to tell all he knows. But in such cases the leave of the trial judge to cross-examine should be obtained.”

And the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982, The Carswell Company Limited, Toronto) outlines at Chapter 21, ‘Manner of Questioning Witness’, the current state of the law with respect to the use of leading questions on examination-in-chief as follows:

“Notwithstanding the general prohibition upon leading questions on examination-in-chief and re-examination, an examiner should, in certain situations, lead the witness and in others he may lead with the judges’ permission. In these instances, leading questions are permitted because (i) convenience, efficiency or necessity outweighs the danger of suggestion or (ii) the danger of suggestion is very low. The ‘exceptions’ to the ban against leading questions are as follows:

(d) If the witness is against the party calling him or unwilling to testify, to overcome his lack of cooperation and obtain his testimony, the examiner may, in the judge’s discretion, ask leading questions.”

In addition, of course, full rights of cross-examination are available to a party calling a witness if the witness demonstrates “hostility” in the stand in the sense of an apparent unwillingness to answer questions and tell the truth. *R. v. Coffin*, (1956) S.C.R. 191, at page 213; *Town of Meaford*, [1981] OLRB Rep. June 634. Such rights do not, however, flow from the mere circumstance of the witness being opposite or adverse in interest in the proceeding itself. As Chief Justice Carter commented in *Atkinson v. Atkinson* (1982) 10 N.B.R. 271 (C.A.):



“It does not necessarily follow that an opposite party on the record must be a hostile witness at the trial.. When a party has been...called by the opposite party he is, we conceive, to be treated and examined as any other witness would be, until he assumes a hostile attitude, or conducts himself on the stand in such a way as to satisfy the judge that an examination in the shape of a cross-examination is necessary for the elucidation of the case, or the extracting of truth. This is a matter which must be in the discretion of the Judge, *who will perhaps more frequently have occasion to exercise it where the adverse party is called than in other cases.*”

(emphasis added)

5. Counsel for the complainant has already been allowed considerable latitude in his manner of examining Mr. Reilly by opposing counsel, presumably in the light of the case law and the practical circumstances, and it may be that the examination can now be completed on that basis. Should a further issue over the form of questioning arise, however, the Board will deal with that issue on the basis of the manner in which the witness appears to be giving his responses, in accordance with the principles referred to above.

6. On the subsidiary issue of whether, on the basis of section 9 of the *Ontario Evidence Act*, the answers of Mr. Reilly can be “used against him” in these proceedings, the Board does not find anything in the authorities cited by the respondent to persuade it that they cannot. The section provides:

“Section 9(1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the legislature.

(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for the section or any Act of the Parliament of Canada, he would therefore be excused from answering such question, then, although he is by reason of this section or by reason of any Act of the Parliament of Canada, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of the Legislature.”

Counsel for the respondent places reliance on the absence of the word “other” in describing the proceedings in which the witness has immunity, and contrasts that to the *inclusion* of the word “other” in comparable legislation elsewhere. In determining the intent of the section, however, it must be noted that in any proceeding to which the immunity is read to extend, the legislation declares that the witness’s answer (which he is compelled under subsection (1) to give) not only shall not be used against him, but shall not even be “receivable” in whatever proceeding the Legislature had in mind. That, it seems to us, underscores the difficulty with the respondents’ position. As Rose, J. observed in *R. v. Fox* (1899), 18 P.R. 343,

“... if the action could be said to be a proceeding, matter, or question under any Act of the Legislature of Ontario within the meaning of sec. 9, he would be compellable to answer any question pertinent and material to the issue, even though the question might tend to subject him to independent criminal proceedings or to an independent prosecution for a penalty...”

The absurdity of the contrary view, if I may say so, would appear, if a person on trial for a criminal offence were to go into the witness box to give evidence, and should object to answer some question put to him by counsel for the Crown, on the ground that the answer might tend to criminate him, and were told by the counsel: ‘Your privilege not to answer has been taken

away statute; you must answer, but your answer so given shall not be used or receivable in evidence against you in this trial.' Would not the witness answer: 'That is no protection, for as I give my answer it is used and received in evidence against me.'"

And in *Chambers v. Jaffery*, (1906) 12 O.L.R. 377, Britton, J., stated with respect to the same Ontario provision, at page 383:

"It must now be considered as settled law and practice that the protection to a witness from his answers extends only 'to danger from independent contemporaneous or subsequent prosecution.'"

We accept that as the correct interpretation of section 9.

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**2591-84-R Ontario Public Service Employees Union, Applicant, v. Elizabeth Fry Society of Ottawa, Respondent**

**Bargaining unit - Employee - Employer - Practice and Procedure - Participants in work experience programme placed with non-profit organization - Wages fully subsidized by government - Whether employees - Whether organization or government actual employer - Participants excluded from unit of regular employees - Employees called in only on "as needed" basis not excluded from part-time unit - Employees working on short-term contracts not excluded - 30/30 rule and 7 week rule not departed from**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *F. C. Burnet* and *P. Grasso*.

**APPEARANCES:** *Barry Casey*, *Charleen Rose* and *Faye Ball* for the applicant; *John M. Scott* and *Carol Faulkner* for the respondent.

**DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER P. GRASSO; July 9, 1985**

I

1. The name of the respondent is amended to read: "Elizabeth Fry Society of Ottawa".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. When this matter originally came on for hearing before the Board on January 18, 1985, the parties were able to reach only partial agreement on the description and composition of the unit of employees appropriate for collective bargaining. There was no substantial dispute

as to the facts; however, there was some dispute as to how the bargaining unit should be framed in light of the agreed facts, and because this application was not reached until late in the day, the parties were only able to outline their respective positions. Accordingly, it was agreed that they would make their submissions in writing. Unfortunately, there was some delay in forwarding those submissions to the Board.

## II

5. The respondent is a non-profit corporation carrying on activities in the City of Ottawa. Its mandate is to provide assistance to women in conflict with the law. This mandate is carried out through counselling, a residential programme, court programmes, advocacy and fund raising. The respondent receives funding in various proportions from: The United Way, private donations, the (Federal) Department of Correctional Services, the Ontario Ministry of Correctional Services, the Ontario Ministry of Community and Social Services, and the local and regional municipalities. In addition, it provides supervision for parolees on a fee for service basis, paid by the federal correction authorities.

6. The respondent has a central office location at 195A Bank Street, Ottawa, where its administrative work, client counselling, and volunteer co-ordination is carried on. In addition, the respondent owns and operates two residential facilities at 240 Charlotte Street, Ottawa ("Ferguson House"), and 24 Adelaide Street, Ottawa ("McPhail House"). This application relates to the employees at Ferguson House and McPhail House. The employees in the proposed bargaining unit are primarily "residential supervisors" and social workers.

## III - Youth Corps Workers

7. The first problem raised by the respondent concerns certain individuals employed for a limited time under municipal, federal, or provincial government funded programmes - in particular, persons working pursuant to the "Ontario Youth Corps Programme". The respondent maintains that these individuals are not its employees.

8. The goal of the Ontario Youth Corps Programme is to reduce unemployment among young people who have left school and are experiencing difficulty finding work or starting a career. It is administered by the Ontario Youth Secretariat which is concerned that such persons be directed to projects which are capable of:

- 1) providing jobs for those facing special difficulties in seeking employment (Group A - eg/ grade 11 education or less; minimal work experience, physical and/or mental disabilities; problems with the law; and/or those in receipt of welfare assistance);
- 2) providing jobs to young people with academic qualifications suitable for a skilled or professional job, or who require an opportunity to begin a career (Group B - eg/ graduation from a secondary or post-secondary course; qualified in a trade; qualified business skills; etc.);



- 3) providing jobs in community organizations offering training and/or the opportunity to provide basic job skills;
- 4) providing jobs in community organizations offering career-related work;
- 5) providing worthwhile community services and/or contributing to the economic development of the province.

The programme is open to Ontario residents aged 15 to 24 who have left school, are unemployed, and have been looking for work for at least twelve weeks. As noted, potential participants are divided into two groups. Those in Group A, facing particular difficulties in seeking employment, are entitled to a full wage subsidy from the government. The participants in "Group B" have a higher level of skill or education, but are likewise having difficulty finding a full-time job. They are entitled to receive a \$2.50 per hour wage subsidy. The persons we are concerned with fall into Group A.

9. The programme guidelines establish the terms and conditions of employment. All Ontario Youth Corps participants must be paid the provincial minimum wage, plus statutory holiday pay and vacation pay benefits. The programme prohibits any "supplementation of wages beyond the minimum wage". "OYC" employees receive neither travel allowances nor room and board. They may work a maximum of forty hours per week, but they are not supposed to work or be paid for overtime hours, nor are they supposed to work on statutory holidays. If this is unavoidable, they must be given compensatory time off in lieu of pay. They must not be paid for meal breaks unless the specific employment situation requires that they work during this time, and they are paid only for hours actually worked. If a participant takes time off due to vacation leave or illness, he is not paid for that time. Days lost for these reasons may be made up at the end of the programme if there is sufficient time remaining prior to March 31, 1985. It is interesting to note that a letter to the respondent from an official of the Ministry of Correctional Services contains the following statement:

Youth Corps participants are considered employees of your organization and should be covered under your Workers' Compensation schedule. Please ensure that a copy of any Worker's Compensation report filed is forwarded to the Special Employment Coordinator."

However, Youth Corps workers must not replace or encroach upon the work of regular employees.

10. The general information filed with the Board indicates that the Ontario Youth Corps Programme operates for a maximum of 26 weeks starting on or after September 4, 1984, and ending no later than March 31, 1985. The precise duration of the subsidy is subject to change from year to year. Under the auspices of the Ministry of Correctional Services, the respondent currently provides work opportunities for a maximum of 20 weeks, commencing on or after October 15, 1984, and terminating no later than March 31, 1985. In the previous year, the work opportunities were of 16 weeks duration. It is not clear whether there has been any continuation of these "programme positions" past March 31, 1985. Presumably, that will depend upon a favourable assessment by the established administrative and political authorities.

11. It is clear that, in the absence of the programme, there would be no positions with

the respondent. From the respondent's perspective, it is providing a form of subsidized work experience for young people in difficulty. It does not "need" their services, in the sense that they are filling a vacant position or performing work which would otherwise be done by the respondent's own employee complement. Indeed, as we have already mentioned, one of the express terms of the programme is that its participants must *not* displace regular employees. The primary beneficiary of the programme is the participant who gains work experience, but must still be supervised by the respondent's regular employees. The benefit to the respondent, if any, comes only during the final weeks of the programme when the participant has learned the respondent's routine and can work without assistance or supervision. Before that, she can only be assigned relatively menial tasks.

12. The number of programme participants placed in the respondent's organization was determined not by the respondent's need to service its clients, but rather by the respondent's ability to supervise and assist the Youth Corps participant. The respondent was asked "how many can you take" and decided it could take two. The respondent considers itself under a moral obligation to assist disadvantaged young people, however, there is no commitment or expectation of continued employment beyond the end of the programme. A participant may acquire skills or a familiarity with the respondent which will make her more competitive should a vacancy subsequently arise in the respondent's organization, but there is no real likelihood that this will occur, or that the Youth Corps participant would be given any particular priority. The respondent keeps no personnel records and makes no formal evaluation of the Youth Corps workers.

13. The Youth Corps workers perform tasks assigned by the respondent and subject to its supervision, direction and control. They are paid by cheque bearing the respondent's name. The respondent is shown as the "employer" for unemployment insurance and Canada pension plan purposes, and deducts those amounts from the individual's cheque, as it is required to do under the terms of the programme. Likewise, the respondent deducts any income tax which may be payable. Payroll statements are then prepared in the prescribed form and submitted to the Ministry of Correctional Services for reimbursement. The terms and conditions of employment for the Youth Corps participants bear no relation whatsoever to the terms of the respondent's regular employees. They are prescribed and circumscribed by the provisions of the programme. Any effort by the respondent to modify or supplement those terms is prohibited.

14. The first question which we must consider is whether the disputed individuals are "employees" and, if so, of whom. The applicant union takes the position that they are employees of the respondent. The respondent asserts the contrary. The respondent notes the practical and administrative control exercised by the Ministry of Correctional Services over both the selection and remuneration of the disputed individuals. The respondent also points out that although it may benefit from their work performance, they are not required by the respondent, nor would the respondent normally consider hiring them. The respondent argues that, if anything, they are "crown employees" employed by the Ministry of Correctional Services which ultimately provides their wages.

15. We do not agree. If one applies the usual legal criteria to the relationship between the respondent and the participants in the programme, there is little doubt that it points to an employer-employee relationship. The participants are not volunteers, students, or independent contractors. They work for wages. They are referred to the respondent by others, but they

are interviewed and finally selected by the respondent, and paid at a fixed rate computed hourly from which the usual “employee” contributions (UIC, CPP, income tax, etc.) are deducted. Although the participants may be inexperienced, their tasks are not generically different from those performed by the respondent’s regular employees. After an initial familiarization period, they are providing services to the respondent, subject to the respondent’s direction and supervision. While not determinative, it is also interesting to note that the terms of the programme itself envisage that the participants will be “employees” of the participating organizations. That is why it is necessary to ensure proper documentation and coverage for workers’ compensation purposes. Rehabilitation and training are aspects of the programme, but employment is the dominant theme - albeit short-term employment in “make work” projects. The circumstances here are different from those before the Board in *Regional Municipality of Hamilton-Wentworth*, [1982] OLRB Rep. Aug. 1179, but the observations of the Board at paragraph 18 of that decision are equally apposite:

We do not attach much significance to the fact that an arrangement may be described as a “make work” scheme funded in whole or in part by the public purse. Over the years (and particularly in times of economic difficulty) many Canadians have derived their wages through work support programs such as Dree, LIP, the Young Canada Works Program, and numerous other schemes for the support of employment through direct channelling of Government funds to employers both public and private. The whole purpose of such program is to draw on the pool of unemployed workers in an area or category (e.g. youth), and it is not at all unusual to find that such programs give preference to the “hard core” unemployed, whose U.I.C. benefits have expired and who have little chance finding other jobs. Nor is it unusual that such individuals would be employed by a public sector employer to do manual work of a community service character. And, as in the instant case, the number of jobs provided will be contingent upon the funds made available. In today’s society there is nothing particularly novel about employment in a publicly funded “make work” program of limited duration where the participants have no real prospects of advancement. One may question the value of collective bargaining for such persons but that does not mean that they are not employees. (See: *Waterloo Roman Catholic Separate School Board*, [1977] OLRB Rep. Dec. 856, and *Kelowna Centennial Museum Association*, [1977] 2 Can LRBR 285 - both of which involved persons employed in a government funded make work program, performing jobs which, but for those government funds would not be done.)

We conclude that the Youth Corps participants are “employees” of the respondent.

16. But that is not the end of the matter. It remains to be determined whether this particular category of employee should be included in a bargaining unit of individuals exhibiting more “normal” employment characteristics.

17. In resolving this question, we might begin by observing that the notion of an “appropriate” bargaining unit is a labour relations concept with no common law antecedents and, in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes “labour relations sense” to lump together for the purposes of collective bargaining. Section 6(1) of the Act leaves the Board’s discretion to fashion bargaining units largely unfettered, permitting the Board to weigh the facts before it in light of its own experience, collective bargaining criteria, and public policy considerations. Yet the Board’s determination is obviously of immense practical importance. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to organize or effectively represent the group of employees. In practice, a markedly different community of interest may be coincident with a markedly different appetite for collective bargaining with the result that if the Board frames the unit too broadly, there may be no collective bargaining



at all. This is one of the reasons (although not the only one), why the Board continues to maintain the distinction between “part-time” and “full-time” employees (see *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330 and *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713).

18. There can be little doubt that the respondent’s relationship with the participants in the Youth Corps Programme is not the same as that of a typical employer, nor do they have a typical relationship with the respondent’s other employees. By the very nature of their position, their collective bargaining interests or concerns could not be the same. Not only is the duration of their employment fixed and limited, but more importantly their terms and conditions of employment are prescribed *externally* and (in accordance with the terms of the programme), cannot be altered without prejudicing the subsidy which creates the work opportunity in the first place. Obviously, any collective bargaining on their behalf would take place under severe constraints, and there are real impediments to the application of collective bargaining methods and sanctions (including a strike) to these unique circumstances. Indeed, one may well question the efficacy of formal collective bargaining for persons in the position of the participants here, since, as a practical matter, there really would be little prospect of improving their economic circumstances without eliminating the very rationale and basis for their existence within the respondent’s organization. They simply do not “fit” the collective bargaining model envisaged by the *Labour Relations Act*.

19. This is not to say that the Board should be exclusively or unduly concerned with the likely results of collective bargaining, or whether it would be effective from the employees’ point of view. Collective bargaining effectiveness is largely linked to the exercise of bargaining power, and while the Act contemplates that collective bargaining will enhance the employees’ bargaining power and ability to improve their economic position, there is no guarantee that this will be the case. However, the Board must be concerned where a proposed bargaining unit includes individuals who have such a divergent community of interest that their very presence might be eliminated if collective bargaining were actually applied to them, and where the rights and collective bargaining objectives of the respondent’s regular employees (part-time and full-time) could be retarded by including in their bargaining unit employees with such different interests. In any event, we conclude that the Youth Corps workers should be excluded from the bargaining units the applicant seeks to represent.

20. The other issues raised by the respondent pose fewer difficulties, since there is a well-established body of board jurisprudence and collective bargaining practice in Ontario which can assist the Board in framing the appropriate bargaining unit. Much of this material is considered at length in the recently published *Ontario Labour Relations Board Law and Practice*, by J. Sack, Q.C. and C.M. Mitchell, both of the Ontario bar. However, it may be of assistance to the parties to refer briefly to certain matters of particular relevance to the issues raised in this case.

#### IV - Part-time Employees and Students

21. The respondent operates on a 24-hour basis, providing “around the clock” services and supervision for its “clients”. In order to maintain its schedule, it is necessary for the respondent to engage what it describes as “relief workers” who fill in the gaps in that schedule

(usually on weekends or holidays). The respondent argues that they should be excluded from a “part-time” bargaining unit, because they are not *regularly* employed for any particular hours. They are engaged on a sporadic “as needed” basis. There is no guarantee by the respondent that any particular individual will be given work, and conversely, there is no commitment by any such persons that they will be available to work. They are paid on an hourly basis with no deductions withheld, other than for income tax, unemployment insurance and Canada pension plan. The respondent further seeks the exclusion of “students employed during the school vacation period” although on the material before the Board there is no evidence of any history of hiring such individuals.

22. Over the years, the Board has developed a number of general approaches to bargaining unit definitions, which, in turn, have become incorporated into the structure of collective bargaining in this province. That, after all, is one of the purposes of section 6(1): to inject a public policy element into the process of bargaining unit determination so as to establish a degree of uniformity and viability consistent with the needs of an employer in a particular case and the desires of his employees for self-organization and self-determination. These guidelines cannot, of course, be applied in an arbitrary way without regard to the case before the Board, but with certification applications now numbering over a thousand each year, there is an obvious need for procedural certainty and predictability to serve the expectations of the labour relations community and the parties who appear before the Board on particular cases. Moreover, since the Board has been making these bargaining unit determinations for almost four decades, what we might describe as “approaches” or “practices” or “policies” have been translated into collective bargaining practice over the years. Accordingly, there is a substantial onus on any party requesting that the Board depart from procedures that are known, accepted and relied upon by unions and employers alike.

23. In recognition of the fact that employees who work substantially fewer hours than full-time employees, do not generally share a community of interest with the latter group, the Board has generally excluded “part-time employees” from full-time bargaining units, and placed them in a separate unit at the request of either employer or the trade union (see *Board of Education for the Borough of Scarborough*, *supra*, and *Toronto Airport Hilton*, *supra*, for a discussion of the policy considerations which underlie that approach and which we here adopt). However, the practice of the Board has been against making distinctions between employees based upon the (actual or probable) duration of their employment with an employer (with the exception of certain “seasonal” employees in certain industries, such as the canning industry and the tobacco industry). Thus the Board has generally declined to distinguish between permanent and temporary (or “casual”) employees, and has generally included them in a common bargaining unit (see, for example, *Philcon Food Services*, [1981] OLRB Rep. Dec. 1771, application for reconsideration dismissed, [1981] OLRB Rep. Dec. 1771; *Board of Education for the Borough of Scarborough*, *supra*, and *Spraymotor Ltd.*, [1976] OLRB Rep. May 215).

24. As we have already noted, persons employed less than 24 hours per week are typically excluded from the “full-time” bargaining unit and included in their own bargaining unit together with students employed during the school vacation period. Balancing concerns about fragmentation with those of community of interest, the Board, early in its history, decided that the standard “part-time” bargaining unit should consist of not only part-time employees, but also students employed during the school vacation period. The Board has sometimes deviated from that approach to accommodate the agreement of the parties in

particular cases, but in general “part-timers” and “students” have been grouped together. And whatever the merits or origins of this practice, it is now well rooted in collective bargaining practice and much too late to suggest that this way of describing a bargaining unit is “inappropriate” - at least in the absence of compelling evidence to the contrary.

25. Here, the respondent does not dispute the appropriateness of a “part-time” bargaining unit, but claims that its relief workers are not *regularly* employed for not less than 24 hours per week. However, the respondent’s position is based upon a misreading of the Board’s jurisprudence and the established collective bargaining practice. It is not the regularity of their employment or hours which is significant, but rather whether, when employed, they *regularly* work less than the 24-hour cutoff point which has traditionally distinguished “full-time” and “part-time” workers for collective bargaining purposes (and which is recognized in the forms prescribed by the regulations made pursuant to the Act). Someone working ten hours one week, five hours the week after that, and twelve in the following week would still be a “part-time” employee because his regular work pattern involves work weeks of less than 24 hours. Moreover, there are lots of employers who employ workers on a part-time “casual call-in” basis. A public hospital, for example, will typically have a list of registered nurses who “fill in” on weekends or holidays. So will many nursing homes. Such nurses are generally grouped in the “part-time” bargaining unit.

26. The Board’s normal practice in determining which employees are full-time and which are part-time, is to look to a period of seven weeks immediately prior to the application as being a representative period in which to assess the number of hours worked. If during four or more of the seven weeks examined a person works more than 24 hours per week, he will ordinarily be treated as falling within a bargaining unit of full-time employees. Conversely, if during four or more of those weeks the individual works less than 24 hours per week, he will be treated as a “part-time” employee properly included in a part-time bargaining unit. The 7-week guideline is, of course, another procedural construct, arising from the Board’s experience, adopted in certification proceedings to facilitate and give some predictability to resolving the characterization of employees appearing on the employer’s full-time and part-time list. The Board recognizes that working hours are infinitely variable but, by the same token, it is necessary for employers to have some guidelines as to how to reply to a certification application, and for trade unions to know how to structure their organizing activities (see *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116, and *Sydenham District Hospital*, [1967] OLRB Rep. May 135).

27. Having considered the representations of the parties, and in the circumstances of this case, we see no reason to depart from the established Board approach to bargaining unit determinations. We are satisfied that “part-time” status should be measured in accordance with the 7-week rule mentioned above, and that there is no reason to depart from the practice of grouping together part-time employees (i.e., persons regularly employed by the employer but for periods varying from 1 to 24 hours) with students employed during the school vacation period.

#### V - Contract Employees

28. We have also considered the respondent’s submissions with respect to the so-called



“limited term contract employees” who may be hired from time to time, for limited periods, to perform specific projects such as preparing briefs to government agencies. We are not persuaded that we should specifically exclude them from the bargaining unit. Not only is there no evidence that any such individuals currently exist, but it is by no means clear that should such persons be hired from time to time, they would have a markedly different community of interest from the other employees in the bargaining unit. And, of course, to exclude them merely further fragments the respondent’s small work force, since they too would be in a separate bargaining unit.

29. All employees have a “contract” of some kind or other and provide their particular skills to their employer for a period of time. There is nothing particularly unusual about preparing reports on social subjects. Many larger social service agencies have persons on staff whose duties include preparing such material. It is not obvious that someone hired to do this work, even on a short-term basis, will have such a different community of interest from the respondent’s regular employees. As we have noted, the Board has not been inclined to define bargaining units in terms of the duration of employment, nor exclude non-existent classifications. We do not think we should do so here.

#### VI - The 30/30 Rule

30. On an application for certification, the Board is required to determine the number of “employees in the bargaining unit at the time the application is made” and assess membership support as of the “terminal date” fixed pursuant to section 103(2)(j). These two dates establish the temporal reference points for making the determinations and calculations contemplated by section 7 of the Act. For the most part, subsequent changes in employee complement or wishes are irrelevant.

31. The only individuals with an unequivocal claim to being employees in the bargaining unit at the time the application is made are those actually at work on that date - even though, for various reasons, there may be other individuals (on layoff, sick leave, maternity leave, etc.) who are not actually at work when a certification application is made, but who should nevertheless be treated as employees in the bargaining unit for labour relations purposes. That is the group to which the Board looks when determining whether the applicant union has the level of support necessary for outright certification or entitlement to a representation vote (see section 7 of the Act). The Board endeavours to give the words “employee in the bargaining unit” a meaning which is sensible and workable and which will also appropriately accommodate the individual and collective bargaining interests at issue.

32. What are those interests? They can be simply stated. Employees seeking to organize themselves should be able, with some certainty, to identify the constituency of their fellow employees whom they must organize, and that will be used by the Board when assessing the degree of membership support necessary for certification. On the other hand, there will always be some individuals who are not actually at work on the date of the certification application, but who will still have a sufficiently substantial employment attachment to the bargaining unit (however defined) to justify inclusion in the employee constituency and a voice in the selection of the bargaining agent, even though they may not be actively employed on the day the application is made. In order to balance these concerns, the Board has developed what is now

colloquially described as the “30/30 rule” which the Board applies for the purposes of determining whether the individuals in the bargaining unit not actually at work on the date the application is made should nevertheless be treated as employees in the bargaining unit at that time (see *Ampliphone Canada Limited*, [1967] OLRB Rep. Dec. 840). The “30/30 rule” is applied to the persons whom the employer is required to list on Schedules “C” and “D” of its reply.

33. In order to meet the requirements of the 30/30 rule, a purported bargaining unit employee not actually at work on the application date must have worked at some time in the 30-day period immediately preceding the application *and* work, or be expected to return to work at some time in the 30-day period immediately after the application date. Of course, like all rules, this one could be considered somewhat arbitrary; however, the fact is that it too, has withstood the test of time (at least 30 years) and without it or some similar arguably arbitrary rule, it would be impossible to expeditiously process the hundreds of certification applications which the Board must resolve every year. Time is of the essence in labour relations matters, and without such guidelines, collective bargaining rights could be practically defeated or denied. The 30/30 rule has been regularly and routinely applied in a variety of industrial contexts to the obvious advantage of parties who must make or respond to certification applications. No rule is written in stone, and from time to time the Board has departed from the 30/30 rule where the circumstances warranted a different approach. But, once again, there is a substantial onus upon any party seeking to persuade the Board to depart from this well-established, useful and well-accepted practice. The Board is satisfied that the 30/30 rule can and should be applied in this case.

## VII

34. Having regard to the evidence and representations of the parties, the Board finds the following two units to be appropriate for collective bargaining:

### Bargaining Unit #1

All employees of the respondent in Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period and persons employed pursuant to the Ontario Youth Corps Programme.

### Bargaining Unit #2

All employees of the respondent in Ottawa regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons employed pursuant to the Ontario Youth Corps Programme.

35. Having regard to the agreed facts respecting their duties and responsibilities, the Board is of the opinion that Ms. Coffin and Ms. Horner do *not* exercise managerial functions

within the meaning of section 1(3)(b) of the Act; however, for the purpose of clarity, the Board notes the agreement of the parties that they are properly characterized as “office employees” and are excluded from the above-mentioned bargaining units. The Board’s decision in this regard should not be construed as any general statement on the appropriateness of bargaining units in similar facilities.

36. On the basis of the documentary evidence of membership filed with the Board, it appears that regardless of whether certain disputed individuals are regarded as “part-time” or “full-time” employees in accordance with the approach set out above, the union will be entitled to certification on an interim basis in the full-time bargaining unit. In other words, whether Ms. Clark, Turner and Murray are properly on Schedule “A” or Schedule “C”, more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 8, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

37. Accordingly, pursuant to section 6(2) of the Act, the Board hereby certifies the applicant on an interim basis for the “full-time” bargaining unit described above.

38. It also appears that the union will be entitled to at least interim certification in the part-time bargaining unit, because of the level of membership support among the respondent’s part-time employees. However, the Board is reluctant, at this stage, to do the arithmetic necessary to establish a precise membership count because some of the respondent’s written representations include mention of several other relief workers who might be considered “part-time” employees in accordance with the “7-week rule” and included in the bargaining unit “at the time the application was made” in accordance with the 30/30 rule mentioned above. The Board does not wish to delay this matter further, but out of an abundance of caution, the Board considers it appropriate to appoint a Labour Relations Officer to meet with the parties to enquire into the employee list and composition of the part-time bargaining unit. In all likelihood, when the parties examine the respondent’s work records and apply the above-noted “rules”, they will be able to settle the employee list and the composition of the part-time bargaining unit without a further hearing before the Board. Accordingly, the Officer is authorized, in his discretion, to reveal the membership count once the list has been settled. If appropriate, a certificate can then issue in respect of the part-time unit, without the expense and delay of a further hearing.

#### **DECISION OF BOARD MEMBER F.C. BURNET;**

1. I am in agreement with the substantive decisions of the Board set forth in Section VII of the award, but wish to record my dissent with respect to the classification of Youth Corps participants as employees of the respondent for the purposes of the Act.

2. The respondent is in the business of providing rehabilitative services to various persons, including the subject participants. In business terms, Youth Corps participants represent a market for the respondent, rather than providers of service to maintain operation of the business. Thus, they are customers, not employees. They provide no service for the primary benefit of anyone but themselves; they do not perform work which would otherwise



be done by anyone else; and their hours, duration of employment (20 weeks), and remuneration levels are controlled entirely by the Department of Correctional Services, not by the respondent. The respondent is simply the agency which provides and supervises their rehabilitative training and not their employer as that term is usually understood.

3. Their inclusion on the payroll of the respondent serves two basic purposes; it is a convenient way of controlling and channeling funds which are essentially intended to be rehabilitative allowances and training subsidies; and second, it simulates an earned wage, which is psychologically important to the rehabilitative process, as well as establishing a basis of participation in U.I.C. and other social benefit plans. These are valid approaches to the objective no doubt, but the simulation of employee status for these purposes does not qualify the participants for employee status within the meaning and intent of the *Labour Relations Act*. Their status is more analogous to that of an unemployed person who is sent to school by U.I.C. for skills upgrading and who continues to draw taxable remuneration even though not in the job market during their training period. They do not thereby become employees of either U.I.C. or the school.

4. I would not classify Youth Corps participants as employees under the Act.

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**0358-85-R** Labourers' International Union of North America, Local 183, Applicant, v. Creson Investments Limited and/or **Fairfield Management Inc.** and/or Fairfield Management Limited and/or Montevideo Limited Partnership and/or Montevideo Park Ltd. Partnership and/or The South Shore Ltd. Partnership and/or Lakeview Limited Partnership and/or Glen Erin Acres Ltd. Partnership and/or 478182 Ontario Limited, Respondents

Certification - Practice and Procedure - Related Employer - Two prior certification applications withdrawn - Whether third application within just over one month not entertained - Board satisfied that withdrawal not made to avoid defeat at polls - Board not determining exercise of discretion on related employer application on basis of preliminary motion - Excluding office and sales staff from unit - Whether second unit of office and sales staff appropriate - Outstanding related employer issue not affecting description or composition of unit - No reason to limit union to interim certificate in circumstances

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *C. A. Ballentine*.

**APPEARANCES:** *Donald Chiasson* for the applicant; *Mark Contini*, *Ann Montgomery* and *George Wilson* for the respondents.

#### **DECISION OF THE BOARD;** July 8, 1985

1. When the Board convened a hearing into this application for certification there were four major issues to be resolved. They were:

- (1) whether the Board should exercise its discretion and refuse, pursuant to section 103(1)(i) of the *Labour Relations Act*, to entertain the application;
- (2) whether the bargaining unit sought by the applicant is appropriate for purposes of collective bargaining;
- (3) the proper name of the employer of the employees whom the applicant was seeking to represent; and,
- (4) whether the Board should declare, pursuant to section 1(4) of the Act, that any two or more of the respondents be treated as constituting one employer for purposes of the Act.

Issues 3 and 4 are interrelated.

2. The Board dealt first with the threshold issue of whether it should exercise its discretion and refuse to entertain the application. The request that the Board refuse to entertain the application is contained in the reply filed by the respondent Fairfield Management Limited. Its request arises out of the fact that the applicant has made three applications for certification within a period of slightly more than one month; that is, between April 10th and May 13th,

1985. The application for certification made on April 10th was a regular one which would result in the Board certifying the applicant if it was satisfied that more than fifty-five per cent of the employees in the bargaining unit were its members; directing the taking of a representation vote if not less than forty-five per cent and not more than fifty-five per cent of the employees in the unit were members; or dismissing it if less than forty-five per cent of the employees were members. On May 1st, the applicant requested leave of the Board to withdraw this application. It filed a new application for certification on May 2nd and signified in the application that it wished a pre-hearing representation vote. The application would have resulted in such a vote if it had appeared to the Board from the records of the parties that not less than thirty-five per cent of the employees in the voting constituency were members of the trade union on the making of the application. The application would have been dismissed without a pre-hearing representation vote if it appeared to the Board that less than thirty-five per cent of the employees in the voting constituencies were members of the applicant. If the application had resulted in the taking of a representation vote, the applicant would have been certified if a majority of the ballots cast had been cast in favour of the applicant. It would have been dismissed if a majority of the ballots cast had not been cast in favour of the applicant. The applicant requested leave of the Board on May 13th to withdraw the application before it was determined whether a vote should be directed. The third (instant) application was filed on May 13th in the same form as the first one; that is, it was a regular application for certification, not one which requested the taking of a pre-hearing vote.

3. The bargaining unit requested by the applicant was the same in all three applications and each application contained the identical request that section 1(4) of the Act be applied to the respondents named in the application. The applicant named two respondents in its first application: Creson Investments Limited and Fairfield Management Inc. The applicant learned of additional possible respondents after the application had been filed. It decided to seek leave of the Board to withdraw the application and file a new one so it could name the additional respondents. The second application named eight respondents, including the two which had been named in the first application and Fairfield Management Limited (hereinafter referred to as "Fairfield"), which had filed a reply to the first application. The request in the second application for the taking of a pre-hearing representation vote, according to applicant counsel, was inadvertent, the result of a clerical error. The applicant believed that substantially more than fifty-five per cent of the employees in the bargaining unit which it was seeking were members of the applicant and it did not want to have a vote. Rather, its objective was to be certified without the need of a representation vote. The applicant believed also that Board policy would not allow the application to be amended so as to delete the request for the pre-hearing representation vote and, consequently, if the application stood, a vote would be ordered. Therefore, on May 13th, the applicant again requested leave of the Board to withdraw its application. As stated above, the applicant filed the instant application on the same date.

4. The respondent Fairfield complied with the Board's direction following each application to post the Board's Notice to Employees advising them of the making of the application. The notices respecting the first and third applications contained notice to the employees of the hearing date set for each one. Fairfield also filed a reply, lists of employees and specimen signatures respecting the first and third applications. It did not file similar pleadings with respect to the second application, but apparently it was unaware of the applicant's request for leave to withdraw the application and only learned of it when it appeared at the appointed time and place for a pre-hearing vote meeting with a Board Officer. Following that incident, Fairfield's solicitors wrote to the Board asking that the Board dismiss the



application and bar any further application from the applicant for a period of six months. The letter reached the Board after its decision granting leave to the applicant to withdraw its application had issued and after the third application had already been received.

5. These were the circumstances which lead the respondent to ask the Board to refuse to entertain the instant application. Respondent counsel acknowledges that the Board generally will apply a bar to further representation applications or refuse to entertain them after an applicant has lost a representation vote, or where a request to withdraw an application has been made after a representation vote has been directed, but before it has been held and the applicant is seen to be attempting to escape defeat at the polls. While the circumstances before the Board in this application did not satisfy that general rule, counsel contends that there are two grounds which justify the Board exercising its discretion under section 103(2)(i) of the Act so as to refuse to entertain this application. First, because of the inconvenience and unrest caused by the filing of the three applications within such a short span of time. Second, because the applicant's actions in seeking to withdraw the second application after a Board Officer had been appointed and a meeting set to deal with the request for a pre-hearing representation vote were tantamount to seeking to avoid defeat in the vote which would inevitably have been held once the formalities of the meeting with the Board Officer had been completed. Thus, according to respondent counsel, the applicant put itself in the same position as an applicant who seeks to withdraw after a vote has been directed in order to avoid anticipated defeat. If those grounds are not sufficient to cause the Board to refuse to entertain the application, counsel contends further that the applicant should be required to show legitimate, reasonable cause why it should be able to file three applications within little more than a month. Even where there seemed to be some justification for the applicant withdrawing the first application, counsel contends that inadvertence in the form of clerical error is not sufficient reason to allow the applicant to withdraw the second application to make way for the filing of a third one.

6. Applicant counsel admits that the applicant may have been guilty of careless administration when it inadvertently requested that a pre-hearing vote be taken, but it was not motivated to withdraw the application by fear of defeat in a representation vote. To the contrary, the applicant considered that, from the time of its first application, it had adequate support for automatic certification without a representation vote and without any further campaigning in the work place after the making of the first application.

7. The Board recessed the hearing in order to consider the parties' submissions. When the hearing was reconvened, the Board rendered an oral decision that it would not refuse to entertain the application. That decision is hereby confirmed as set out below:

The facts respecting the circumstances in which the three successive applications for certification were made in slightly more than a month are undisputed. It is reasonable to conclude from the facts respecting the first application that when the applicant withdrew it, the applicant was exercising a judgement call about how to deal with the knowledge acquired after the filing of the application that there were additional respondents. The applicant's stated motive for withdrawing the second application was that, having realized it had inadvertently requested a pre-hearing representation vote, believing that it would not be allowed to amend that request and not wanting a representation vote because it was confident of sufficient membership support to be certified without a vote,

it withdrew in order to file an application which would yield that result. It is that application which is now before the Board, in other words, the third one in the series.

With respect to Fairfield's claim that the disruption and uncertainty resulting from the applicant's conduct are grounds for the Board to refuse to entertain this application, there is no doubt that Fairfield was inconvenienced by appearing at the appointed time and place for the pre-hearing meeting with the Board Officer only to hear that the applicant had requested leave to withdraw the second application. Furthermore, Fairfield posted the Board's notices to employees for each application and, for two of the three applications, prepared and filed replies, lists of employees and specimen signatures for employees. There was no evidence, however, of the work place being disrupted by further organizing by the applicant after the making of the first application. On those facts, the Board finds that this case is so readily distinguishable from those decisions of the Board which are exceptions to the Board's general rule and which deal with unusual circumstances as to make the reasoning in those cases not applicable to the facts herein. That includes the Board's decision in *St. Joseph's Hospital at Sarnia*, [1984] OLRB Rep. April 651 to which the Board was referred by counsel for Fairfield.

The Board also finds no basis on the facts to reach the conclusion proposed by counsel for Fairfield that, when the applicant sought leave to withdraw the second application, it was withdrawing in the face of an inevitable representation vote in order to avoid the risk of defeat.

There being nothing else in the facts of this application to cause the Board to exercise its discretion under section 103(2)(i) of the Act to refuse to entertain the application, the Board will proceed to determine the application in its ordinary course.

8. The Board entertained next a preliminary motion from Fairfield's counsel that the Board should refuse to proceed with the applicant's request to have section 1(4) of the Act applied to the respondents. The Board heard and considered the full submissions of the parties on the motion. The main thrust of the submissions from Fairfield's counsel was that it was clear at the time when the application was made that Fairfield was the only employer of the employees affected by the application and it was the only employer of any persons working at the properties referred to in the application. The other respondents, except for Creson Investments Limited (and the Board presumes Fairfield Management Inc. as well), are exclusively investment companies which own the properties. Fairfield through Creson has long term management contracts for the properties involved in this application. Therefore, according to counsel there was no mischief to cure and no good labour relations purpose to be served by a declaration that Fairfield and one or more of the other respondents be treated as one employer for purposes of the Act. The effect of what counsel was arguing was that the applicant's request for a declaration under section 1(4) of the Act was premature. The Board's unanimous ruling was that the balancing required in deciding the exercise of the Board's discretion under section 1(4) was not something which the Board was prepared to do in the context of a preliminary motion and within the time constraints of these proceedings.

Therefore, the Board would deal with the issue of whether two or more of the respondents should be treated as one employer by hearing the evidence and representations of the parties.

9. Before embarking on that issue, however, the Board ascertained from the parties certain facts respecting whether the description and composition of the bargaining unit would be affected by the outcome of the section 1(4) issue. The parties were agreed that Fairfield was the direct employer of the employees affected by the application at its making and none of the other respondents employed persons at the properties in question who would fall within the bargaining unit whether described as proposed by the applicant or by Fairfield. In other words, neither the manner in which the bargaining unit was described nor the employees who would be captured by it would differ if the Board ultimately declared that Creson, Fairfield Inc. or any of the investment companies should be treated as one employer together with Fairfield for the purposes of the Act. Accordingly, the Board decided to sever the section 1(4) issue and proceed to determine the appropriate bargaining unit pursuant to section 6(1) of the Act.

10. The applicant and Fairfield were at issue as to whether office and sales staff should be included in or excluded from any bargaining unit which otherwise might be found to be appropriate. The applicant proposed that they be included. The parties agreed, however, that the appropriate bargaining unit otherwise should be described as "all employees of Fairfield Management Limited in the City of Mississauga engaged in cleaning and maintenance at 2645 Waterford Road (Waterford), 2699 Waterford Road (Lakeside Village and Lakeside Place) and 6650 Glen Erin Drive (Bristol Court) including residential superintendents, save and except property manager and persons above the rank of property manager." The Board heard the parties' submissions on whether office and sales staff should be included or excluded and, if excluded, whether the Board should find a second unit of office and sales staff to be appropriate for collective bargaining purposes. After hearing applicant counsel's representations, the Board rendered an oral decision that it was not satisfied there were conditions which would cause the Board to depart from its normal policy of excluding office and sales staff from a bargaining unit of the type to which the parties were otherwise agreed. Therefore, the Board would exclude office and sales staff from that unit. In the result, the Board asked Fairfield's counsel for his submissions on whether the Board should find a second appropriate bargaining unit of office and sales staff. Both parties acknowledged that the Board's discretion under the Act is broad enough to allow it to do so, but they disagreed whether it should do so under a single application for certification. Fairfield was opposed to the Board making such a finding. Not surprisingly, the applicant urged the Board to find that there was a second appropriate bargaining unit comprised of office and sales staff.

11. The Board's unanimous decision, rendered orally at the hearing and for reasons to be given later, was that it was proper in the circumstances of this application to find that there was a second appropriate unit comprised of office and sales staff. The Board's reasons for so concluding follow. This application had been framed by the applicant so as to include office and sales staff located at the properties included within the geographic scope of the bargaining unit proposed by the applicant. The Board's Notice to Employees of the application put the employees on notice that the applicant was seeking a bargaining unit which was described so as to include all employees of the respondents and which did not exclude office and sales employees. Therefore, office and sales employees were aware from the notice that the applicant was seeking to represent them in collective bargaining together with the other employees. Accordingly, the Board is satisfied that office and sales employees were given proper notice



that the applicant was seeking to represent them. There were no representations filed with the Board from any employees opposed to the application on any grounds. Absent any objection from employees who would be affected by the application, particularly office and sales employees, there is nothing to prevent the Board from finding that the employees whom the applicant is seeking to represent comprise two bargaining units which are appropriate for collective bargaining purposes.

12. Therefore, the Board finds that all employees of Fairfield Management Limited in the City of Mississauga engaged in cleaning and maintenance at 2645 Battleford Road (Waterford), 2699 Battleford Road (Lakeside Village and Lakeside Place) and 6650 Glen Erin Drive (Bristol Court) including resident superintendents, save and except property manager and persons above the rank of property manager, office and sales staff (hereinafter referred to as bargaining unit #1) and all office and sales staff of Fairfield Management Limited in the City of Mississauga at 2645 Battleford Road (Waterford), 2699 Battleford Road (Lakeside Village Lakeside Place), and 6650 Glen Erin Drive (Bristol Court), save and except property manager and persons above the rank of property manager (hereinafter referred to as bargaining unit #2), constitute units of employees appropriate for collective bargaining.

13. The Board is satisfied, on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the respondent in bargaining units #1 and #2, at the time the application was made, were members of the applicant on June 7, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. The Board adjourned the hearing after receiving the submissions of the parties and reserving its decision on the questions of whether the applicant was entitled to interim certification pending the outcome of the section 1(4) issue and whether the Board as constituted herein was seized with the section 1(4) issue.

15. The Board has had the opportunity to review the parties' submissions on those remaining issues and is of the view that interim certification under section 6(2) of the Act is irrelevant since no impediment remains in the way of the Board issuing a formal certificate to the applicant pursuant to section 7(3) of the Act. The Board has been able to discharge its obligations under section 6(1) and 7(1) of the Act. It has determined the unit of employees that is appropriate for collective bargaining as required by section 6(1) and it has ascertained the number of employees in the bargaining unit on the making of the application and the number of employees in the unit who were members of the applicant on the terminal date of the application. The terminal date fixed for the application, in this case it was June 7th, 1985, is the date which the Board determines under section 103(2)(j) of the Act to be the time for the purpose of ascertaining membership under section 7(1). Counsel for Fairfield argues that, should the applicant serve notice to bargain, the employer would not know who to bring to the bargaining table until the section 1(4) issue is resolved. Whether or not the Board finds that Fairfield and any other respondent should be treated as one employer, the matter of representation at the bargaining table is entirely in Fairfield's hands. It is neither a matter for the Board to decide nor grounds for withholding certificates to which the applicant is otherwise entitled. Thus the fact that the section 1(4) issue remains to be resolved has neither prevented the Board from discharging its obligations under sections 6(1) and 7(1) of the Act nor established an impediment to the Board issuing formal certificates pursuant to section 7(3).

In this respect see the Board's decisions, as yet unreported, which issued October 12, 1984 and May 3, 1985 in Board Filed No. 1223-84-R and Board File No. 1457-84-R.

16. Therefore, certificates will issue to the applicant with respect to bargaining units #1 and #2.

17. In view of the nature of the submissions received from the parties and the rulings and decisions made by the Board at various stages of these proceedings, the Board as constituted herein declares that it should be seized with the matter of whether the Board should issue a declaration under section 1(4) of the Act respecting Fairfield and any of the other named respondents.

18. The Board directs the Registrar to list this application for continuation of hearing with respect to that remaining issue.

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**2000-84-OH Mr. Kevin Lunn, Complainant, v. Firestone Canada Inc., Respondent**

**Health and Safety - Employee refusing to throw heavier tread on to platform - Refusal motivated by fear of injury by physical motion required - Circumstances covered by term "work-place" in Act - Reasonable relief continued even after ambiguous report by safety inspector - Absence of intention to penalize no defence once employee refusal found within rights under Act**

**BEFORE:** *D. E. Franks*, Vice-Chairman, and Board Members *J. D. Bell* and *C. A. Ballentine*.

**APPEARANCES:** *John Cheeseman, John Denny, Kevin Lunn* and *John Terry* for the complainant; *A. M. Heisey, W. V. Hilson, H. Borsato* and *W. Twyford* for the respondent.

**DECISION OF THE BOARD;** June 25, 1985

1. This is a complaint that the complainant, Mr. Kevin Lunn, has been dealt with by the respondent contrary to section 24 of the *Occupational Health and Safety Act* [1978] as a consequence of which the complainant seeks to be compensated for two days pay in respect to the evening shift of October 6th and October 7th, 1984 in which the complainant was sent home without pay by the respondent.

2. The complainant, Mr. Kevin Lunn, works for the respondent Firestone Canada Inc. as a tire builder in the passenger tire department at the Hamilton plant. Mr. Lunn normally works on Tire Assembly Machine (TAM) 582. Part of the job consists of throwing a tread onto a platform compensator which is some distance above Mr. Lunn's head. The normal weight of this tread was estimated by witnesses to be between 8 and 14 pounds. At about the time in question, the respondent employer was assigning the construction of certain light truck

tires to employees in the passenger tire department. A week before the events in question, Mr. Lunn had for two nights in a row, being September 27th and September 28th, made a number of these light truck tires at his machine, TAM 582.

3. Mr. Lunn's evidence was that as a result of assembling a number of tires with this heavier tread than normal, the tread for the question weighs 22 1/2 pounds. Mr. Lunn experienced some soreness in his back and shoulders presumably due to throwing the heavier than normal tire tread onto the platform compensator of the tire assembly machine. Mr. Lunn's evidence was that he had mentioned this difficulty to his supervisor at the time. The supervisor in question, however, did not remember any complaint by Lunn concerning the construction of the heavier tire nor did Lunn report of any soreness or complain to the first aid department of the respondent, nor was any compensation claim made in respect of the work of September 27th and 28th.

4. On the evening of the shift of Friday, October 5th, Lunn was again assigned to build this light truck tire on TAM 582. It appears that for the first part of the shift there was a shortage of materials and Lunn was assigned to work on another assembly machine. By seven o'clock in the evening, however, the materials arrived and just before the lunch break, Lunn was informed by his supervisor that he would be starting to assemble the heavier tire at 582 after the lunch break was over.

5. When the lunch break ended, Lunn refused to work on his machine. The acting supervisor for the evening, Mr. Attilio Manna was not familiar with what to do in the circumstances of a refusal by an employee to work. He in turn called the supervisor of the adjacent truck and bus department, Mr. Best, and together Mr. Manna and Mr. Best discussed the situation with Mr. Lunn.

6. The evidence of both Mr. Manna and Mr. Best is that they did not perceive Lunn's original complaint to be a complaint related to occupational health and safety. They viewed the complaint as being a matter of Mr. Lunn's having difficulty throwing the 22 1/2 pound tread up onto the compensator of the machine. As a result they suggested using a "tread box" which is a fourteen inch high step box used in handling treads as a method of getting a tread to the appropriate height on the compensator. At this time both Best and Manna made it clear to Mr. Lunn that he would be guaranteed his rate for the day, thus, removing the pressure from Lunn to build a specified number of tires during the shift. That is to say that Lunn could work slowly with the heavier weight and still be guaranteed his rate for the day.

7. Lunn continued to refuse on the basis that he was afraid that the throwing of the heavier tread up onto the tire assembly machine platform was likely to cause himself an injury and he was not prepared to even throw one tread for the fear that even one tread might cause him back or shoulder injuries as a result of the awkward and difficult motion. It became clear to Mr. Manna and Mr. Best that Mr. Lunn was engaging in a work refusal pursuant to section 23 of the *Occupational Health and Safety Act* and once that was appreciated the process envisaged in section 23 of the Act occurred, thus an inspector from the Occupational Health and Safety Branch of the Ministry of Labour was called in. An investigation was made which lasted until the early hours of the morning. Later that morning, the inspector, Mr. Hart, issued his report.

8. The work refusal of October 5th is not at issue in the present case. The present



case concerns what happened on the evening shifts of October 6th and October 7th. Before turning to the events of October 6th and 7th which give rise to the present complaint we should first look at the last portion of the report issued by the Occupational Health and Safety Inspector:

“Writer left the plant at 3:00 a.m. on Oct. 6th and returned at 8:30 a.m. to issue this report.

Writer left the plant at approximately 11:00 a.m.

No orders were left with the employer, however section 14(2)(g) the employer’s responsibilities with respect to taking every precaution reasonable in the circumstances for the protection of a worker was discussed with respect to physical limitation of a worker and the weight of material that can be lifted safely by any worker.

#### DECISION:

It is the decision of this writer and the reason to believe that Lunn and Disanto have as to possible injury to themselves and their physical limitations that the lifting and throwing of 100-125 tire treads per shift onto the compensator of TAM #582 is likely to injure these workers.(sic)

Mr. Hilson was reminded that a copy of this report was to be given to Messrs. Lunn, Disanto and Ward.

Mr. Hilson stated that he would appeal this decision.”

In many respects the report by Inspector Hart is the cause of the present complaint. Simply put, both sides read the above-quoted conclusion of the report and each drew the conclusion that the report vindicated their position. That is, the respondent employer took the position that since no orders were left, the employer was doing nothing wrong from a safety point of view. Indeed, the representative of the employer responsible for occupational health and safety, a Mr. Hilson, took the position that the report found the machine to be safe and the appeal from the inspector’s finding was that the inspector did not have the jurisdiction under the *Occupational Health and Safety Act* to make any finding as to the reasonableness of Mr. Lunn’s belief which appears to be one way of reading the decision set out in the inspector’s report.

9. When Mr. Lunn reported for work on Saturday the 6th of October he was as required by law given a copy of the inspector’s report and time to read it. Mr. Lunn’s reading of the report and in particular the paragraph following the heading “Decision” was that he was completely justified in refusing to perform the work in question. Thus, after reading the report, Mr. Lunn was asked if he was prepared to build the light truck tire on TAM 582. Mr. Lunn refused on the grounds that he felt that the construction of the tire was unsafe and that the report justified his reason for feeling that it was unsafe. The employer, on the other hand, took Mr. Lunn’s refusal as being a refusal for personal reasons to build the tire on his machine and the employer refused to assign Mr. Lunn alternate work and therefore he was sent home without pay.

10. In acting in that manner the respondent takes the position that it was merely enforcing a longstanding policy with respect to the assignment of work in its tire departments. Absent considerations of safety, a person working at tire building is expected to perform the work as assigned on his machine. This work is strenuous physical work and the tire builder, if he is unable to perform the assigned tasks for personal reasons, such as a sore hand from outside the work place, is assigned to light duty or sent home if light duty work is not available. The position of the respondent was that they regarded Mr. Lunn's refusal to work on Saturday the 6th as a personal inability rather than a safety reason and Mr. Lunn was sent home.

11. The next day, the 7th of October, Mr. Lunn also reported to work, he again refused and was again sent home. Mr. Lunn in these proceedings claims that his being sent home constitutes a penalty for his refusal to work pursuant to section 23 of the *Occupational Health and Safety Act*.

12. Since October 7th Mr. Lunn has not been assigned the building of the tire in question on TAM 582. We should, however, note that subsequently the Ministry of Labour was contacted and a specialist from the Safety Studies Service of the Ministry of Labour conducted a detailed ergonomics study of the task to be performed by Mr. Lunn. That report was issued in October, 1984 and it finds amongst other things that the task in question was safe for some seventy-five per cent of the working population. Mr. Lunn was shown that report at that time and it appears that he agreed that if he was assigned such work in the future he would perform it. However, at the hearing in this matter, Mr. Lunn altered this position and reverted to his original position that he was still not prepared to perform the work.

13. The relevance of the specialist's report to this case is not clear. On the one hand, the respondent employer took the position that if the ergonomics report had said the work was unsafe the respondent would have paid Mr. Lunn as a consequence of his work refusal. However, since the report says that the work is safe, the question remains does it constitute a defence to the present application? Clearly, the answer to that question is no. The report and its finding that the work in question is safe does not constitute a defence for the employer in the present case. In fact, the ergonomics report, like the report of the safety inspector itself does not constitute a defence in these cases. They are essentially irrelevant with respect to the issue of whether there is a violation of section 24 of the Act, that is, discrimination for exercising a right under the Act. (See, *Auto Jobbers Warehouse Limited* [1981] OLRB Rep. Dec. 1715). We would note in passing, however, that it may not be possible for Mr. Lunn to reasonably hold the belief that he would be injured after that ergonomics report, but that is not for us to decide in the present case. We are only concerned with the events of October 6th and October 7th.

14. There is a threshold question in the present case, however, as to whether or not the subject matter of the complaint is in fact covered by section 23 of the Act. Both subsection 3 and subsection 6 of section 23 refer to (a), (b) and (c):

“(a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;

(b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or

(c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.”

Subsection 8 in turn reads as follows:

“The inspector shall, following the investigation referred to in subsection 7, decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.”

In the present case one notes that the safety inspector’s report specifically says that no orders were made and it would appear on its face that subsection 8 contemplates the inspector making orders *vis a vis* the “machine device, thing or the work place or part thereof”. The Board has held in previous cases that the Act does not extend to cover the personal characteristics of the concerned employee. See, for example, *Wheeler Metal Products Limited* [1983] OLRB Rep. Aug. 1386 where the Board found that the refusal to operate a grinder by a person suffering from asthma was not covered by the Act “section 23 was intended to provide a remedy for workers in danger not for those who are physically unsuited to a job which upon reasonable evaluation presented no problems to other workers.”. In a very basic sense this reflects the employer’s perception of the present case. That is, people are assigned to work on the machines and if they are not physically capable of performing such work then that is not a safety matter. By applying the rules of the work place the employer is not discriminating against anyone for exercising a right under the Act.

15. The crux of Lunn’s complaint is that it was unsafe for him to throw the heavier tread up onto the platform of the TAM 582 for fear that the motion might injure him. The Board has given a broad interpretation to the term “work place” in section 23. Basically the Board takes the view that the term “work place” is to be given a broad meaning and to encompass the actual work situation. (See, for example, *Bill’s Country Meats Limited* [1984] OLRB Rep. Nov. 1549 at 1554). Lunn’s complaint in the present case involves the relationship of the worker to the machine. Such a complaint is not personal to Mr. Lunn. Thus, for example, he is not saying that he is too short or too weak to throw the tread, and if that were the basis of the complaint then of course his refusal would not be covered by the Act. In that case he would be similar to the asthmatic grinder operator in the *Wheeler Metal* case. Rather, Lunn’s complaint is specifically about the physical motion required to operate a machine. That clearly is part of the “work place” and indeed known as the study of ergonomics. As noted above there has been an ergonomics assessment of the motions involved in the job in the present case.

16. The next point we must deal with is the concern expressed by the employer that Lunn’s conduct in the present case was motivated by considerations other than safety. As we have noted earlier in this decision the situation arose because the respondent employer was starting to build light truck tires in the passenger tire department. It should be understood that under the collective agreement each employee in a sense has a proprietary interest in his regular machine. Thus, the employees under the collective agreement use seniority to bid for machines and in turn the machine itself frequently determines, for instance, the entitlement to work overtime. In addition, we should note that each employee has a rate or a quota of



a type of tire to be produced on his particular machine. At the time of the original refusal on October 5th no rate had yet been set for this tread on Lunn's machine. Lunn's evidence is that he had complained of soreness on the two previous days that he had made 90 and 105 tires during his shift. Indeed, the report by Inspector Hart refers to making 100 to 125 tire treads per shift. This suspicion by the employer that Lunn's refusal was part of a broader set of negotiations on the rate to be set for light truck tires was increased by Mr. Lunn's representative at the hearing in this matter. The representative of the applicant raised the issue of piece-work rates when cross-examining the various witnesses called on behalf of the respondent. Clearly, if that was the reason behind Lunn's refusal, then the refusal would not be a matter of exercising a right under the Act and the Board should not allow such disputes to be disguised as safety disputes.

17. The employer emphasized that Lunn was guaranteed his rate both on October 5th and later on the 6th and 7th with which we are presently concerned. That is to say, Lunn would be permitted to build the tire as slowly as he wanted to without suffering any financial loss for not having performed up to a quota. Counsel for the employer argues that since Lunn could work as slowly as he wanted to on the days of the work refusal his concern about injuring himself is not believable. Further, since Inspector Hart's report also refers to the number of tires being built in a shift, Lunn could not rely on the report to justify his refusal. Thus, at best, Hart's report only deals with possible injury if one is required to build a quota of 100 to 125 tires per shift on that machine and not situations where no quota at all is set.

18. In the absence of testimony by Mr. Lunn himself that view of events might be tenable. Mr. Lunn, however, in giving his evidence was clear that he was concerned that any one performance of the operation might cause him a back or shoulder injury. Further, this is totally consistent with his refusal to perform even a simple task in the presence of his supervisor or the safety inspector. We are, therefore, of the view that Lunn's refusal was not motivated by other considerations such as establishing a quota for a shift. Indeed, from his demeanour we are satisfied that he honestly believed that the work might cause him injury and that for the period in question after Inspector Hart's ambiguous report he could reasonably continue to hold such a belief. Therefore, it is our view that in refusing to work on October 6th and October 7th Mr. Lunn was acting within his rights under section 23 of the Act.

19. This brings us to the most perplexing part of the present case. On the one hand, we are prepared to find that Mr. Lunn had reason to believe that the work was unsafe. However, we are also of the view that the employer did not have any intent to discipline Mr. Lunn because Mr. Lunn was exercising a right under the Act. Rather, the respondent was applying its regular policy with respect to employees assigned to perform a certain task. That there was no such specific intention by the employer to discriminate against Mr. Lunn is not a defence under section 24 of the Act *once it is found that the employee was acting within the scope of his rights under the Act*. The employer understood what Mr. Lunn was saying and chose not to believe him. Although the employer refused in good faith to believe Mr. Lunn's concern, the net result was that Mr. Lunn was deprived of two days employment because he exercised a right under the Act.

20. For the foregoing reasons, therefore, we are of the view that Mr. Lunn is entitled to two days compensation. Because of the facts in this case we are of the view that this is not an appropriate case to require the posting of a notice by the employer.

21. We feel compelled to observe that in many respects the four day hearing in this

matter results from the incomprehensible report of the safety inspector. Both sides honestly took the report as justifying their separate positions and we cannot criticize them in doing so. The unfortunate consequence of Inspector Hart's attempt to resolve the problem appears only to have made it worse.

22. There remains one other matter to be dealt with. The representative of the complainant asked that this Board impose a fine upon the respondent of its breach of the Act. It is clear, however, that it is not within the power of this Board to impose the penalties set out in Part IX of the Act and that request is dismissed.

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**0721-85-U Public Service Alliance of Canada, Complainant, v. Forintek Canada Corp. and Jacques Carette, Respondents**

**Evidence - Practice and Procedure - Unfair labour practice complaint against employer - Union seeking direction to produce salary survey conducted by employer and any documents relied on in defence - Extent of Board jurisdiction to order production**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *F. W. Murray* and *S. O'Flynn*.

**APPEARANCES:** *Denis J. Power, Aaron Rubinoff, Terry Kearney, Terry Ranger, Raymond Dubois, Peter Garrahan, Mary Mes-Hartree* and *Charlene Hogan* for the complainant; *Patricia J. Wilson, Ann Hayward, K. A. French* and *Jacques Carette* for the respondents.

**DECISION OF THE BOARD; July 26, 1985**

1. This decision deals with a request by the complainant that the Board order the respondent Forintek to produce certain documents said to be relevant to the matters in issue in these proceedings. The request and the parties' submissions thereon were made July 18, 1985, near the end of the second day of the Board's hearing of this complaint. Presentation of the complainant's case in chief was then complete, and the Board had indicated it would not be calling on the respondent to commence presentation of its case before adjourning to September 23, 1985, the next date scheduled for hearing of this complaint. The nature of the request and the reasons for our response to it are best explained by first describing briefly the nature of this complaint and the circumstances in which the request arose.

2. The respondent Forintek is a body corporate engaged in research and development in the forest products industry. It is financed primarily by governments and, indeed, was a federal government organization prior to its "privitization" in 1979. It operates laboratories in Ontario and British Columbia. The complainant trade union was certified by this Board on August 17, 1979 to represent certain employees of the respondent at its Ontario laboratories, which are located in Ottawa. The latest of the parties' collective agreements with respect to this unit was signed April 17, 1984, and covers the period April 1, 1984, to March 31, 1985.

The respondent Jack Carette is a member of the corporate respondent's senior management who deals with employee relations matters and represents the corporate respondent in collective bargaining.

3. The complainant's allegations, as set out in its complaint filed June 25, 1985 and elaborated during the first two days of the Board's hearings, may be stated briefly (not exhaustively) as follows:

- (a) Early in the term of the aforesaid collective agreement, Forintek unilaterally commenced a salary survey.
- (b) After the complainant gave notice to bargain on January 2, 1985, the respondents advised it and the employees it represented that the salary survey had been completed and that Forintek had concluded that the salaries of certain employees were lagging behind those of their counterparts working in other companies. The respondents proposed making adjustments to the salaries of employees for the period January 1, to March 31, 1985, and solicited the complainant's permission to do so. However, the respondents refused the complainant's repeated requests for a copy of the survey and for particulars of the names of bargaining unit employees whose salaries it proposed to adjust and the amounts of those individual adjustments.
- (c) When the parties began formal collective bargaining with a view to entering into a renewal collective agreement, the respondents again refused to provide the complainant with particulars of the survey or of the proposed salary adjustments. It refused to discuss those matters or treat them as the proper subject matter of collective bargaining. It refused to disclose the precise salary being paid to any employee in the bargaining unit unless the complainant could first produce a written release signed by the employee authorizing the disclosure of that information.
- (d) During the period from the middle of February to the middle of June, 1985, the respondents repeatedly communicated directly with bargaining unit employees, telling them that money was available to adjust their salaries if the complainant would only consent to the adjustments, that the complainant had not consented to the adjustments and that the complainant had offered no reason for refusing to consent. During that period the respondents also engaged in various conversations with employee members of the negotiating team and of the executive of the local union into which the bargaining unit was organized, without involving staff representatives of the complainant who were acting as spokespersons for the negotiating team and for the complainant union.
- (e) On June 12, 1985, the respondent implemented salary adjustments on a retroactive basis without having secured the consent of the complainant. Some of the employees received no salary adjustment. One of those was the President of the local union.



- (f) On June 21, 1985, Forintek's President spoke to employees represented by the complainant. The subject of his speech included the company's negotiations with the complainant trade union and the salary adjustments which the company had recently made. He accused the complainant union of treating employees unjustly and told them that a Ministry of Labour conciliator had expressed surprise at the union's approach to salary negotiations.

The complainant's position is that these and other alleged actions of the respondents amount to attempts by the respondents to effect an end run on the union by bypassing it and going directly to employees with respect to matters that should be part of the negotiations between the complainant union and the respondent employer. It alleges that the respondents have prevented a full, free, honest and rational discussion of issues outstanding between the employer and the union. It says that the conduct of the respondents was calculated to undermine and embarrass the union, and to foster dissension within the unit, so as to result in the respondent employer ridding itself of the union. It says the respondents' conduct frustrated bargaining and amounted to surface bargaining. The company's behaviour with respect to the salary adjustments, and particularly the granting of the salary adjustments, is also said to constitute an unauthorized and unlawful change in working conditions. All these actions are said to be contrary to the provisions of sections 15, 64, 66(a) and (c), 67(1) and 79(1) of the *Labour Relations Act*.

4. The respondents' position, as set out in their Reply, is that the aforesaid collective agreement permitted the pay increases which are the subject of this complaint. Those increases are said to be in conformity with a salary administration policy which has been communicated to the complainant and to employees. The respondents claim the policy is "to pay employees based on merit at the market average within its ability to pay." They say that:

...the Respondent [Forintek] has refused to negotiate the individual salary adjustments with the Complainant because the Respondent implemented the salary adjustments in question under the 1984-1985 collective agreement, which expired on March 31, 1985 and because the pay increases were allocated on the basis of merit. The Respondent's position on this issue is that the salary adjustments are irrelevant to the negotiation of a 1985-1986 collective agreement.

From the submissions of their counsel, the position of the respondents appears to be that the actual amounts paid to bargaining unit employees is not a matter which Forintek is obliged to disclose to the employees' bargaining agent, and in that respect the respondent proposes to argue that *DeVilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49 and the decisions which followed it were all wrongly decided. The respondents say their direct communications with employees were merely for the purpose of explaining Forintek's position and clearing up confusion which it perceived among employees on the issues addressed. The respondents deny they acted contrary to the *Labour Relations Act* in its allocation and distribution of pay increases and denies, further, that they intended to undermine the union or to avoid collective bargaining.

5. The request counsel for the complainant made at the conclusion of the first two days of hearing of this complaint was that the Board direct the respondents to produce the following documents:

- (1) Accounting records showing the amount of salary paid to each bargaining unit employee

- (a) In the last payroll prior to December 31, 1984;
  - (b) The last payroll prior to March 31, 1985; and,
  - (c) The first payroll after June 30, 1985, the accounting records which show the amounts distributed to bargaining unit employees on June 12, 1985, and any records showing when and how those amounts were actually recorded in the books of the respondent corporation.
- (2) The salary survey.
- (3) The letter distributed by the respondents to managers in the Ottawa laboratories as to what they should do about the salary adjustments - a document from which Mr. Sadler is said to have read at a meeting of employees in the Biotechnology lab on or about January 21, 1985.
- (4) Any other document relevant to the salary adjustments.

Counsel for the complainant asked that the Board order direct production prior to the resumption of the hearing of this complaint.

6. Counsel for the respondents agreed that it would produce to counsel for the complainant a copy of the letter referred to in sub-paragraph (3) of the preceding paragraph of this decision. In addition, she agreed that the documents referred to in paragraph numbered (1) would be produced, although she was not then sure what form certain of the information was in. We do not consider it necessary to make any formal order for production of the documents which counsel has undertaken to produce, and we assume counsel will be able to work out the mechanics of the production of those documents without the assistance of the Board. We need only deal here with the request for an order that the survey and other documentation relevant to salary adjustments be produced.

7. It should be noted that counsel for the complainant prefaced his request for an order that these documents be produced with an observation that he had not made those documents the subject of a summons *duces tecum* served on any official of the corporate respondent, because counsel for the respondents had indicated at the beginning of the hearing that she would be calling the respondent Carette and the President of the respondent Forintek as witnesses. Had cross-examination of either witness been reached before the Board's hearing adjourned, he would have made his request for documents at that stage, he said. As there was to be a delay in the continuation of the hearing, however, the request was being made so as to facilitate preparation for the continued hearing. For her part, counsel for the respondents agreed that we could treat the complainant's request for an order directing production of documents as though those documents had been named in a summons *duces tecum* properly served, in advance of our hearing, on the custodian of the documents in question.

8. The jurisdiction of this Board to direct production of documents adequately described in a summons *duces tecum* properly served on the custodian of those documents was reviewed at length in *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Apr. 659. We

adopt the Board's analysis in that case. We are satisfied that we do have jurisdiction to direct the production of a document described in a properly served summons *duces tecum* if we are satisfied that the content or existence of the document is arguably relevant to issues properly raised by either of the parties to the proceeding at hand.

9. Counsel for the respondents argued that the Board should not direct production of the salary survey. She acknowledged that the respondents would rely, in their defense of their complaint, on the existence of the survey and on certain of its contents. Forintek's witnesses would say the survey showed that some of its employees were being paid salaries which were between three and twenty per cent less than those paid to workers in comparable positions in other companies. She argued that the Board should not and could not order production of the survey, however, even during cross-examination of a witness who had given such evidence. This proposition was put on several grounds. One was that the survey document contains information to which the respondents' witnesses would not make reference during their testimony and which would not, therefore, be relevant. By way of example, counsel stated that the survey contains information with respect to the work performed by and salaries paid to persons employed by the respondent corporation in its laboratories in British Columbia. Counsel also argued that the presence in the survey document of information about employment relationships in other provinces deprives this Board of jurisdiction to order its production, even if the document itself is in the custody of a person within Ontario who has been properly served with a summons issued by this Board. We are at a loss to understand how a document which contains material admittedly relevant to the issues before us can be immune from production by reason of its containing information which is either irrelevant or extra-provincial in origin or both.

10. Counsel for the respondents also argued that we should not direct production of the survey because to do so would be to grant one of the remedies requested in the complaint. In making this submission, counsel for the respondents characterized the complainant's case as being directed primarily to the proposition that the respondent company was obliged, by the duty to bargain in good faith, to produce the salary survey in the course of and for the purpose of collective bargaining. That proposition, she argued, should only be dealt with after both parties have had an opportunity to present their evidence and make full argument thereon. Counsel went on to comment on the evidence of one of the complainant's witnesses, who she said had conceded that the complainant would not need the survey in question in order to engage in collective bargaining. She suggested it would be unfair to order production of an employer's surveys when, she claimed, a trade union is not obliged to reveal the information it prepares in connection with collective bargaining. She did not argue, however, that the survey had been prepared as a guide to Forintek's collective bargaining strategy or that it contained information about Forintek's collective bargaining strategy.

11. We begin our analysis of these submissions by agreeing with counsel for the respondents that we are not now and should not now be dealing with any question whether this or any other survey prepared by a party to collective bargaining should be produced to the other party for the purpose of collective bargaining. The question before us is whether this particular survey should be produced in the course of this litigation for the purpose of this litigation. The complainant's position is that the survey is producible because its existence and content are relevant. It does not argue that the content is relevant to its claim that the failure to disclose that survey in collective bargaining is a breach of the duty to bargain in good faith. The complainant's argument is that the existence and content of the survey are relevant in



assessing what motivated the respondents in offering salary adjustments in the way they did, in distributing salary adjustments in the way and at the time they did, and in allocating the amounts of those adjustments among employees in the way they did. The complainant will invite the Board to conclude that the respondents' motivation in all of its actions in relation to the salary adjustments was to undermine the union. Counsel for the respondents says her witnesses will explain their actions with reference to the existence and content of this survey, among other things. The complainant will be entitled to challenge that explanation in cross-examination. To deny the complainant production of a document which the respondents claim was the basis of their actions would be to deny the complainant the opportunity to challenge that explanation and unfairly limit the hearing of its complaint.

12. Counsel for the respondents did not suggest that any legal privilege attached to the survey document in question. However, she argued that even if we have jurisdiction to direct production, we nevertheless also have a discretion to refuse to order production. Counsel invited the Board to exercise that discretion in her client's favour with respect to the survey document. We appreciate that in any decision of this kind there will be a process of balancing the need for a fair, open and expeditious process of litigation against the concern that the Board's processes not be used as an instrument to harass or annoy or unreasonably invade the privacy of participants (and non-participants) in the proceedings. Counsel for the respondents did not explicitly accuse the complainant of fabricating issues, on which the existence and content of the survey became relevant, so as to obtain the survey at an early stage and preempt argument that the duty to bargain in good faith did not require production. Counsel for the respondents did not argue that the complainant had failed to establish a *prima facie* case of breach of anything other than section 15 of the *Labour Relations Act*. Counsel did, however, describe the complainant's case as primarily concerned with the respondents' refusal to produce the survey for collective bargaining purposes. In the face of that submission, lest it be thought we have failed to appreciate any of its implications, we feel obliged to observe, as we did during argument, that the complainant's case clearly involves considerably more than a question whether a salary survey must be disclosed during collective bargaining in order to comply with section 15 of the *Labour Relations Act*. Evidence presented by the complainant during its case in chief, if not successfully challenged or explained, is more than adequate to establish each of the complainant's factual allegations and to form the foundation for an inference that the respondent company was driven throughout by the motivation ascribed to it by the complainant. This is not a case in which a complainant has made allegations which are without foundation for the purpose of engaging in a fishing expedition. The issues on which the survey and its contents are relevant are substantial and serious ones. We are satisfied that they have not been raised solely for the purpose of obtaining information to which the complainant might not otherwise be entitled.

13. In *Shaw-Almex Industries Limited, supra*, the Board noted that in court proceedings, each party to the litigation obtains production of the other parties' relevant documents on an implied undertaking that he will make use of them only for the purposes of that action, and for no other purpose. The authorities for that proposition are set out in paragraph 18 of that decision (a list to which one might now add *Lac Minerals Ltd. v. New Cinch Uranium Ltd. et al*, (1985) 50 O.R. (2d) 260 (Ont. H.C.), in which Mr. Justice Craig confirmed that the "implied undertaking" rule is part of the law of Ontario). After reciting the cases that described the "implied undertaking" rule, the Board made these observations at paragraphs 18 and 19 of *Shaw Almex Industries Limited, supra*:

...Although the passages and cases just cited all concern production of documents on discovery in civil actions, the principles set out therein bear equal application to any legally compelled

production of documents which occurs in the course of a quasi-judicial proceeding the documents into evidence in a public hearing.

...In our view, there is an implied undertaking by a party to whom documents are produced as a result of the use of a summons *duces tecum* issued by the Board. It is an undertaking to the Board as much as to the party from whom production is compelled. The undertaking is that the documents will not be sued for collateral or ulterior purposes. The undertaking is similar in scope and effect to the undertaking discussed in the cases cited above. Breach of the latter undertaking is a contempt of court, as is the breach of any undertaking given to a court. By virtue of section 13(c) of the *Statutory Powers Procedures Act*, breach of an undertaking to the Board may be the subject of contempt proceedings in the Supreme Court of Ontario....

14. We have observed that the complainant seeks production of the survey not for the purpose of collective bargaining but for the purpose of this litigation. Having regard to the “implied undertaking” rule, it would be quite improper for the complainant to make use of the survey in collective bargaining if it obtained it only as a result of this request.

15. We are satisfied that the existence and content of the survey are relevant, that we have the jurisdiction to order its production and that there is no reason to delay production until the point in our continued hearings at which a witness might be cross-examined on its contents or its introduction into evidence might be sought. There will be cases where a balancing of the interests involved requires such a cautious approach. We are satisfied that the interests of both parties in a fair and speedy hearing and resolution of the issues in this complaint favour affording counsel for the complainant an opportunity to examine the document before the hearings resume, so that he can prepare to deal with it at that time without the necessity of further adjournments. Of course, such production is obtained on the basis of the implied undertaking discussed in *Shaw-Almex Industries Limited, supra*. Counsel for the complainant will no doubt take the nature and seriousness of that undertaking into account in assessing with his client whether anyone other than counsel should examine the document at this stage. Counsel’s advisor, for example, is also involved in collective bargaining. Should he read the survey as a result only of our order that it be produced for the purposes of this litigation, he could make no use of it during collective bargaining; the mere mention of it during collective bargaining would constitute contempt.

16. Counsel for the complainant has also asked that we direct production of “any other documentation relevant to salary adjustments”, which he says would include everything that went into the decision-making process at every stage. We do not doubt our jurisdiction to make an order in such broad and general terms, but we are not satisfied that we should do so in these circumstances. The object in exercising this jurisdiction is not to create a general discovery process analogous to that available in the civil courts. Our object is to expedite the hearing process, and we must be concerned that the steps we take to expedite that process do not take on a separate life of their own which engages the parties in time-consuming arguments over whether generalized discovery of obligations have been met or breached. We do think it appropriate to direct that the respondents produce now any documents on which they propose to rely in the course of presenting their case. As for documents on which the respondents do not propose to rely but which are relevant to the salary adjustments issue, we direct that the respondents have such documentation available with their representatives at the continued hearing in this matter. We note that this latter direction is no different from the obligation which would arise if the complainant were now to serve a summons *duces tecum* employing that general language, and the approach required by this direction seems consistent with the

very reasonable approach taken by counsel for the respondents in not insisting on the formality of service of a summons and conduct money.

17. The only remaining question concerns the mechanics of the production which this order requires be made prior to the continued hearing of this complaint. Counsel for the complainant said he would be content with an arrangement whereby production would be made to him in the offices of counsel for the respondents. Having regard to the Board's analysis in *Shaw-Almex Industries Limited, supra*, it appears to us that the appropriate formal order is to require that the subject documents be filed with the Registrar on or before a specific date, unless the parties in the meantime can agree on other arrangements.

18. The Board therefore orders and directs that the respondents produce the aforesaid salary survey and any documents on which they propose to rely in their defense of this complaint. Unless in the meantime the parties make alternate arrangements for the inspection of the aforesaid documents, production thereof shall be made by depositing the said documents with the Registrar of this Board at its offices at 400 University Avenue within ten days after the date of the release of this decision or within such further period of time as may be agreed to in writing by the parties. Once filed, the document will be made available for the inspection of an authorized representative of the complainant during the Board's office hours.

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**2931-84-M; 2932-84-M Mary Geyer and Barbara Jannis Hall, Applicants, Ontario Public Services Employees Union, Respondent Trade Union, v. Niagara South Board of Education, Respondent Employer**

**Religious Exemption - Union not having spent funds on pro-abortion position - Objection based on abortion issue premature - Union's lack of dedication to God and support of strikes contrary to religious beliefs - Dual motivation of religious beliefs and dissatisfaction with union administration - Religious belief primary reason - Exemption granted**

**BEFORE:** *Paula Knopf*, Vice-Chairman, and Board Members *F. W. Murray* and *P. Grasso*.

**APPEARANCES:** *Gerald Vandezande* for the applicants; *Linda Rothstein*, *Susan Bazilli* and *Frances Lankin* for the respondent trade union; no one appeared for the respondent employer.

**DECISION OF PAULA KNOPF, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; July 17, 1985**

1. The name of the respondent union is amended to read: "Ontario Public Service Employees Union".

2. This case involves two applications under section 47 of the *Labour Relations Act* for an exemption from paying any dues, fees or assessments to the respondent union because of the applicants' religious convictions and beliefs. At the outset of the proceedings, the parties



agreed to hold the hearings of both applications together and to apply some of the evidence to both applications. This expedited the proceedings considerably. However, it was clear to all the parties that the two applications would be assessed and adjudicated separately. The evidence of the respondent union applies to both applications.

3. The respondent union and the Niagara South Board of Education (the Board of Education) entered into their first collective agreement effective January 1, 1984. Article 3.01 of that collective agreement provides:

ARTICLE 3 UNION SECURITY

3.01 The Employer shall deduct from every employee any monthly dues or assessments levied in accordance with the constitution of the Union and/or by-laws. The amount of dues paid by each employee in the tax year shall be included on that employee's T4 slip.

Membership in the union is not a condition of employment. Therefore, these cases deal only with the obligation under the collective agreement to pay dues and assessments to the union.

Application of Mary Geyer

4. Mrs. Geyer is a half-time secretary with the Board of Education. She has been in their employ since 1958. She has never been a member of a trade union or paid dues to a trade union until required to do so by Article 3.01.

5. The evidence is clear that Mrs. Geyer is an active and diligent member of the Faith Pentacostal Tabernacle Church. She is "a born again Christian" who has dedicated herself to the service of her church and to religion, both financially and through practice.

6. As soon as Mrs. Geyer became aware that dues were being deducted for the union she asked that her dues be held in trust until she could resolve the issue by making this application to the Labour Relations Board. When the Board of Education indicated that it was not able to fulfil her request she wrote the following letter to the union's president:

This past January 9, 1985, I received notification from the Niagara South Board of Education a memorandum to all Half-Time Secretaries — Continuing Education informing me that I am now a member of Local 256 with O.P.S.E.U. and that dues will be deducted from my pay in accordance with the terms of the Collective Agreement.

This comes as quite a surprise to me as I have not had any previous information of such an organization, have not had any notice to attend any meetings and express my personal opinion or choice, nor have I signed any union card. I feel as if I have been "railroaded" into an organization that I do not wish to join or support financially because of its affiliation with the Ontario Federation of Labour and The Canadian Labour Congress especially in the 'abortion issue' which is supported by these organizations and one which I am totally against. I will never support an abortion issue!

As a Fundamental Christian Beliver, I cannot, knowingly, support the principles and practices of this Union. Such practices contradict my christian beliefs which have first priority in my life. The bible teaches me that in all that I do, I must honour God first and obey His words.

Phillipians 4:8

Finally, brethren, whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report, if there be any virtue, and if there be any praise, think (act) on these things.

Does O.P.S.E.U. fit the above? I believe not!

My immediate obligation is to my employer.

Colossians 3:22

Servants, obey in all things your masters according to the flesh; not with eye service, as menpleasers, but in singleness of heart, fearing God.

I have worked for the Board of Education since 1958 — ten years full time and thereafter, part-time. The Board has dealt with me fairly and I am and have been very satisfied with wages and benefits. What more can O.P.S.E.U. do? Further, O.P.S.E.U. does not provide my employment — The Niagara South Board of Education does. Therefore, if union dues are to be deducted, I request that they be sent to a charitable organization.

It is to be noted that her application before this Board is not based on her perception of events which took place prior to the certification and regarding the union's conduct through organizing or bargaining.

7. Mrs. Geyer explained to the Board that her objection to the union was based on two fundamental concepts. First, she is opposed to abortion because of her understanding of the teachings in the Bible. She believes that because the respondent union is affiliated with the Ontario Federation of Labour (OFL) and the latter organization has passed a resolution in favour of abortion, she cannot let herself be associated with or support the union. She relied upon the OFL's resolution which was passed in 1984 as a basis of this objection. This resolution reads as follows:

WHEREAS in January 1984, only one-quarter of Canadian public General Hospitals had therapeutic abortion committees, and of those 18% performed no abortions and 18.2% performed between 1 and 20 abortions each; and

WHEREAS this indicates that Canadian women in need of abortions have inadequate, and in some cases, no access to proper abortion facilities; and

WHEREAS it is already OFL policy to support a woman's right to choose, including repeal of the abortion law and legalization of free-standing clinics; and

WHEREAS Dr. Morgantaler and his colleagues have been acquitted by a jury for the fourth time;

THEREFORE BE IT RESOLVED that the Ontario Federation of Labour

1. Urge Attorney-General Roy McMurtry not to appeal the verdict and cease any further prosecution of the doctors;
2. Urge Justice Minister John Crosbie to immediately move to remove abortion from the criminal code;

3. Support the right of the Morgantaler clinic to continue to function without harassment;
4. Urge Health Minister Keith Norton to approve and fund public free-standing clinics providing medically insured abortions;

BE IT FURTHER RESOLVED that the OFL demand of the Ontario government that every public health unit be obliged to set up family planning clinics providing a wide range of gynecological services and counselling. Services must be made available to all, regardless of age, without any requirement for parental consent. In rural areas mobile clinics must be provided on a regular basis.

8. Secondly, Mrs. Geyer believes that the teachings of her church are in conflict with the practices and principles of this union because she feels she cannot honour her employer as required by the Bible and also participate in or condone strike action.

9. Mrs. Geyer also feels that compulsory dues violate her Christian rights by forcing her to support something that is contrary to her understanding of the scriptures. The OPSEU Constitution is also a cause for her objection because she does not find God mentioned in the initiation oath of the organization. She would insist that the constitution and the oath acknowledge and/or be based upon the supremacy of God.

10. On cross-examination, Mrs. Geyer admitted that she has no difficulty with the concept of working with others who do not share her beliefs and she has no quarrel with members of OPSEU expressing their differing views on abortion or their right to strike. However, even if she could be satisfied that no money was spent by OPSEU on the abortion issue, she says she would still object to the payment of dues because she believes that this union "does not give recognition to God."

#### Application of Barbara Hall

11. Mrs. Hall has been an administrative secretary of the School of Continuing Education for the Board of Education since 1977. She is a member of the Calvary Gospel Church and attends regularly. Religion is a very important aspect of her life.

12. Prior to the union gaining certification, there was a Secretarial and Clerical Association at the Board of Education. She was a member of this organization, paying dues to it in accordance with their contract with the Board of Education beginning in 1977. She participated in the Association to the point that she accepted a position of area representative in 1980-81. However, she resigned after a short period because of her discontent with others' conduct at the meetings. She said she had no problems with belonging to this Association because she considered it independent, without affiliation and as "just a group of girls."

13. In May of 1984, she became a member of OPSEU at one of its organizational meetings. She later even witnessed the signature of two other employees to facilitate their joining. However, Mrs. Hall says she experienced a change of heart with regard to the union. She wrote a letter of resignation to the union president on December 7, 1984, which reads as follows:



After thoughtful and much consideration and after reading the Constitution of OPSEU I have come to the conclusion this Union is not the kind of organization I can join and financially support in all good conscience.

The reasons for this are:

1. Because of my Fundamental Christian Belief I cannot accept the principles and practices of this Union as they are in conflict with my christian beliefs which have been taught to me since I was a child.

The Lord Jesus Christ is very real to me and my goal is to do as Jesus Christ would have me do. I cannot see Jesus Christ ever being a member of this Union.

From the Bible we are taught to be faithful to and have a respect for our employer. Here are a few scriptures which bear this out:

Ephesians: Chapter 6, verse 5

“Servants, be obedient to them that are your masters according to the flesh, with fear and trembling, in singleness of your heart, as unto Christ.”

Colossians: Chapter 3, verse 22

“Servants, obey in all things your master according to the flesh; not with eyeservice, as menpleasers; but in singleness of heart, fearing God.”

Timothy: Chapter 6, verse 1

“Let as many servants as are under the yoke count their own masters worthy of all honour, that the name of God and his doctrine be not blasphemed.”

Titus: Chapter 2, verse 9

“Exhort servants to be obedient unto their own masters, and to please them well in all things; not answering again.”

1 Peter: Chapter 2, verse 18

“Servants, be subject to your masters with all fear; not only to the good and gentle, but also to the forward.”

2. I can't financially support an organization which supports the following: Ontario Federation of Labour, The Canadian Labour Congress and the New Democratic Party. The reason for that is the abortion issue. Again, my Christian Belief teaches the value and sanctity of all life.
3. Strike - again, because of my Christian Belief I could not support striking because of how I am suppose [sic] to relate to my employer in the eyes of God. (See scripture text cited under #1.)
4. Union Dues - I am against forcing people to pay union dues which are then used for things which are contrary to my Christian Belief.
5. After attending the general meeting of this Local on November 26, 1984 and in viewing the conduct of the 2 representatives present I would not want to be associated with conduct and principles of this manner, (i.e. the dishonesty regarding the honorariums - per diem, election of executive, use of funds, failure to give consistent account of funds.)

For the above reasons I officially request that the union card I signed be cancelled and my union dues be sent to a charitable organization - such as the Salvation Army.

[It is to be noted that the allegations in paragraph 5 of the letter above were not relied upon by Mrs. Hall in this application and the parties agreed that this was not an issue that was relevant to these proceedings. Hence, the union was not put in a position that it was required to respond to the allegations, although it expressed its ability and willingness to do so, if necessary.]

14. There were several factors which Mrs. Hall says prompted her to write this letter of resignation. She had received a copy of the OPSEU Constitution in September and noticed that Article 4.1.(e) lists "the defence of the right to strike" as an aim and purpose of the union. Mrs. Hall feels that holding a strike is against Christian teachings. She said she could not conceive of a situation when it would be right to strike or support a strike.

15. Another factor that prompted Mrs. Hall to consider resigning is that she had been advised by a family friend that OPSEU had taken a position on the abortion issue. Mrs. Hall wanted to determine what the actual situation was. She called her Local Vice-President, Dorothy McCaffrey, and was told that OPSEU was affiliated to the OFL CLC and the NDP party. (The evidence establishes clearly that there is in fact no affiliation with the NDP.) Mrs. Hall then solicited the OFL's position on abortion and received Resolution S2 which is cited above. Mrs. Hall objects to the expenditure of any money, directly or indirectly, on any pro-abortion or pro-choice position. She feels that secretarial time, stamps or phone calls relating to the abortion questions are all expenditures in support of a position that are contrary to her religious beliefs. She said that she would not be satisfied by testimony that no funds were being spent directly or indirectly by the union in favour of abortion but that she would instead demand a formal position paper issued by OPSEU to convince her that no such expenditures actually existed.

16. Mrs. Hall also explained that there were several factors that caused her a great deal of concern about the administration of the union. This crystallized at a meeting in November of 1984. However, she had been struggling with the issue of her union membership for a long time before that. She had been reluctant to take action or resolve the matter sooner because she met with family hostility towards her position against the union and/or lack of support with regard to her opposition to the union. Also, she was reluctant to go against her fellow employees.

17. However, on December 7, 1984, Mrs. Hall wrote the following letter to her employer:

I respectfully request to have included in the above mentioned contract a clause to allow me and others to pay the equivalent of Union dues to a recognized charity. My reason for being unable to support the Union in anyway is because of my Fundamental Christian Belief. For your information, I have enclosed a sample of such a clause.

Thank you for your attention in this matter which greatly concerns me.

I look forward to hearing from you.

The clause referred to in the above letter reads as follows:

An employee who satisfies the employer to the extent that he declares in an affidavit that he is a member of a religious organization registered pursuant to the income tax act who's doctrine

prevents him as a matter of conscience from making financial contribution to an employee organization that he will make contribution to a charitable organization equal to dues, shall not be subject to this article provided that the affidavit submitted by the employee show [sic] the religious number of the organization and is countersigned by an official representative of the religious organization involved.

By early January, Mrs. Hall had received a copy of the OFL resolution cited above. She then wrote to the Board as follows:

I understand that a Collective Agreement has been signed with the Ontario Public Service Employees Union and you will be collecting dues.

I hereby respectfully request that you place any monies deducted from my salary intended for the Ontario Public Service Employees Union be held in trust pending the Ontario Labour Relation Board's approval of my application for exemption from paying Ontario Public Service Employees Union dues.

Thank you for your attention in this matter.

18. Like Mrs. Geyer, Mrs. Hall expressed no difficulty in working with other employees who had different views. However, Mrs. Hall said she could not support a union that was associated with the position taken by the OFL on abortion. She opposed the concept that any money could be spent by the union, directly or indirectly, in the support of the position taken on abortion.

19. After writing OPSEU and the OFL about her concerns and hearing from the Niagara Board that it could not voluntarily withhold her union dues (because this would amount to a violation of the collective agreement), Mrs. Hall launched these proceedings before this Board.

### The Evidence of the Union

20. The union called Maxine Jones to testify. She has been a member of OPSEU's Local Executive since 1971 and on the Provincial Executive since 1976. The Executive Board passes and administers all policies of the union between conventions and decides upon and monitors expenditures of funds. She was also the chairperson of the Resolutions Committee of the union in 1983 and 1984 conventions. She gave the Board the history of a resolution considered by the OPSEU Convention in 1983 on abortion (Resolution 41). The Resolution Committee's function is to, *inter alia* decide what resolutions from locals should be put to the Convention floor and make recommendation for or against their passage. The Committee twice decided not to put a proposed abortion resolution to the Convention in 1983. However, at the Convention, an individual member was successful in persuading the Convention to vote to have the Resolutions Committee bring the resolution on abortion forward to the Convention as a whole. While this was done in accordance with the vote, the Resolutions Committee took the unusual step of bringing the resolution forward without a recommendation from the Resolutions Committee. When the resolution was put on the floor, a debate was held. Ms. Jones describes the debate as "extremely rational and balanced" both for and against the proposal. Ultimately, Resolution 41 was passed. It reads:

Whereas it should be the fundamental right of each woman to choose when and if she will bear children; and



Whereas present Criminal Code restrictions affect the legality and availability of abortions, and highly organized campaigns are underway to further limit the right to choose; and

Whereas there is not a safe and effective method of birth control for each woman;

Be it resolved that OPSEU endorse a woman's freedom of choice by supporting the right of women to full access to abortion;

Be it further resolved that OPSEU demand the removal of abortion from the Criminal Code;

Be it further resolved that OPSEU demand that free-standing medical clinics providing abortions fully covered by OHIP be established;

Be it further resolved that the Equal Opportunities Co-ordinator prepare a series of three columns for OPSEU News which will explain the problems women face in obtaining a safe, legal abortion; and the reasons why it is important for the trade union movement to take a public stand on this issue.

OPSEU has passed no other motions on the abortion issue.

21. At the OFL Convention in 1983, the OPSEU took no formal position on the OFL proposal and resolution on abortion cited above. Each delegate voted according to his or her own conscience. The same held true at the 1984 OFL Convention, except the caucus did not even discuss the issue at that time.

22. Ms. Jones testified that to her knowledge no monies have been spent in support of Resolution 41. This was corroborated by Frances Lankin who was the Equal Opportunities Co-ordinator in the fall of 1983 until April of 1984. She explained that the articles called for in Resolution 41 have never been prepared nor are there any plans to do them. Indeed, a decision has been made not to prepare the articles because this is no longer a current issue of concern for the membership.

23. It should also be mentioned that on cross-examination, Ms. Jones admitted that OPSEU pays a per capita fee to the OFL and the CLC. Also, the results of the Convention, including the resolution adopted, are distributed to the Local's membership, together with the policy manual updates. She concedes that this involves some expense, but that it is not specifically referable to the stand on abortion.

24. Mrs. Jones also explains that the union's constitution would not permit it to take any action against a member who did not support strike action.

### The Arguments

25. On behalf of the applicants, the Board was urged to examine the applicants' personal religious beliefs and not be concerned with their rationality or bases in church doctrine. Instead, the applicants' subjective belief and sincerity is the fact the Board was asked to focus upon. The Board was referred to a number of cases, in particular *Anderson and the Civil Service*, (1976) 9 O.R., (2d) 341 at 344 (S.C.O.) where the Court upheld the claim for religious exemption which was raised because of the applicant's objection to the use of this

“strike weapon.” It was argued that both applicants had sincerely held religious beliefs and that these formed the basis of their objection to paying union dues. Mrs. Geyer’s case centred on her unwillingness to identify herself with an organization that did not associate itself with God and/or that took a stand on abortion other than her own. Mrs. Hall’s case was based on her inability to support an organization that is committed to upholding the right to strike and which is associated with a position in support of abortion or “the right to choose.”

26. The union submitted that these applications must be examined carefully in the context that the exemption claimed only relates to the payment of dues. It is to be remembered that membership is not compulsory. Therefore, counsel for the union submitted that the evidence should be scrutinized to see if the funds are being spent in an objectionable way, contrary to the religious beliefs of the applicants. It was said that there had to be an irreconcilable conflict between the payment of dues and the religious beliefs that could only be remedied by granting the exemption. In these cases, the issue was whether it could be objectively said that the applicant’s religious views were the cause of their objection to the payment of dues. With respect to Mrs. Geyer, the union’s position was that since Mrs. Geyer admitted in cross-examination that she may not have a problem with dues if it could be shown that no money was spent on abortion, she did not have the necessary “irreconcilable conflict” with regard to the payment of dues. Since Mrs. Geyer supported the right of free expression and since all OPSEU has in fact done is to debate the abortion issue, it was said that there should be no conflict in her payment of dues and her personal religious beliefs. The same was said to hold for Mrs. Hall on the abortion issue. With regard to Mrs. Hall’s objection to the right to strike, the union argued that because she joined the union knowing it would defend the right to strike, this should indicate that the strike issue is not the real cause of her objection. Instead, it should be seen as her objection to the management of the union as expressed in her letter. The union referred the Board to a number of cases and in particular Mr. Tremblay’s application in *Georgian College of Applied Arts And Technology*, [1984] OLRB Rep. Feb. 247.

### The Decision

27. The Board’s consideration of applications for religious exemption has been well summarized in the case involving Douglas Buttler in *The Board of Governors of York University*, [1981] OLRB Rep. Sept. 1319. In that decision, the Board explained as follows at page 1324 and following:

11. The Board in *Helena Wybenga*, [1976] OLRB Rep. Aug. 422 set out the questions which the Board must ask itself about the applicant’s beliefs, when considering an application of this kind:

- (a) are they sincerely held;
- (b) are they religious; and
- (c) are they the cause of the objection to paying union dues?

Of these questions, it is often (b) which poses the greatest difficulty. As the Board commented in *Anthony J. Vis*, [1972] OLRB Rep. March 249, at paragraph 9:

9. Second, there is the question of defining a religious conviction or belief. It has been submitted that before the Board can make a determination as to whether an employee has a "religious conviction or belief" it must define "religious". We doubt that we can accomplish this rather Herculean task in a manner satisfactory to all. However, there are many cases that do not require an exhaustive definition of "religious" to arrive at a determination. It may be that there are peripheral situations where an applicant's "conviction or belief" must be tested against a definition of "religious" but suffice it to say the applicant in this case does not stand at the periphery of what may be considered to be a "religious conviction or belief". We are satisfied that the applicant would fall within any attempted exhaustive definition of religion that we might make.

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13. That the term "religion" can have a meaning which extends beyond the established views of a particular sect is now beyond doubt, and has been reflected in numerous decisions of the Courts as well as this Board. See, for example, *The Civil Service Association of Ontario (Inc.) v. Anderson* (1976), 9 O.R. (2d) 341; *Funk v. Manitoba Labour Relations Board* (1976), 76 CLLC 14,006; *Klaas Stel v. The North York Civic Employees' Union, Local 94, Canadian Union of Public Employees*, [1971] OLRB Rep. July 363; *Vis v. Sheraton-Connaught*, [1972] OLRB Rep. March 249; and *Centennial College*, [1979] OLRB Rep. March 174. On the other hand, it is obviously easier for an applicant to demonstrate, and for the Board to find, a particular belief to be "religious" when it forms a part of the dogma of a group or sect both recognized in society and considered to be religious in the traditional sense. It is this distinction which underlay, for example, the vigorous dissent expressed in the *Centennial College* case, *supra*, at paragraph 4. This, however, is largely a question of credibility. As the Board noted in *Klaas Stel*, *supra*, at paragraph 35:

It was argued, however, that Stel's evidence or affirmation of belief in the witness box must be tested in terms of the consistency and pervasiveness of the belief, particularly where it was not founded on a creed or tenet of faith of a particular church. As we indicated above, we [are] not persuaded that these are absolute preconditions to the establishment of the religious belief, but they may be useful in some cases where there is a credibility issue.

14. Of greater concern to the Board, however, is the applicant's submission that any deeply-held personal belief is, therefore, essentially "religious" within the meaning of section 39. The Board does not find that its cases have ever extended that far. In *Hogertep v. UAW v. General Motors*, [1972] OLRB Rep. Feb. 132, on which the applicant relies, the Board stated:

11. However that may be, it is not the religious convictions or belief of a certain religious sect that must be determined under section 39 of the Act. The religious conviction or belief on which the objection must be based is the *personal conviction or belief* of the applicant and accordingly is a subjective matter.

(emphasis added)

The Board there, however, was simply reaffirming the aforementioned principle that "religion" may be personal to an individual, and need not be tied to an established religious sect. The Board did not say that the belief of the individual need not be "religious" at all. Similarly, in *Stel*, the first case to be decided by the Board under this section, and relied upon as well by the applicant, the Board referred to a number of dictionary definitions of the word "religion", including:

"related or devoted to the Divine or that which is held to be of ultimate importance" (paragraph 22),



and:

“a *personal set* or institutionalized system of religious attitudes, beliefs and practices” (paragraph 26).

(emphasis from the original)

Once again the Board was simply drawing the distinction between an institutionalized versus a personalized religion, and concluded, at paragraph 26:

In light of all the above considerations, we are unable to conclude that an applicant’s religious conviction or belief must necessarily be founded on a tenet or creed of a particular religious faith.

There is, again, no suggestion that the Board need not still determine whether the belief, be it personal or otherwise, is in essence “religious”. Indeed, both of the definitions referred to make reference to “the Divine”, or to a system of “*religious* attitudes, beliefs and practices”, and the words “that which is held to be of ultimate importance” must, in our view, be read in their context. So as not to misinterpret the decision in *Stel*, it is important to note that the Board in that case had no difficulty relating Mr. Stel’s beliefs to the Divine, and any of the Board’s words *obiter* must be read in the light of this conclusion. As the Board said at paragraph 31:

It seems clear that, based on this testimony on affirmation, Stel objects to joining CUPE because of his religious belief in the sense in which we have earlier defined those words. It is a state of mind that membership in CUPE is inconsistent with his duty to Jesus Christ. There can be little doubt that this relates to the Divine.

15. The Board in *Stel* went on to consider as well the argument that the belief of the applicant was too “secular and selective” to satisfy the meaning of the section. The Board observed:

Counsel’s arguments on the secularity and selectivity of the belief are, in reality, addressed to the reasonableness of the belief. Although there may be many who would not understand Stel’s belief and while there may be many who would find it unreasonable and would strongly disagree with it, it is not for the Board to substitute its view as to what constitutes a religious belief for that of the individual.

Again, however, while recognizing the individual’s right to the subjectivity of his own beliefs, this comment falls short of indicating that the individual’s view need not still be found to be “religious”. As the Board went on to make clear in the same paragraph:

However unreasonable the belief may appear to some, the evidence impels us to the conclusion that Stel does have this belief and it is one *based on his religion*.

(emphasis added)

• • • •

17. The Legislature having chosen to limit the exemption to matters of “religious” conviction or belief, it is the task of the Board to ascribe some weight to that word, and to attempt to distinguish the “religious” from the “non-religious”. This becomes particularly cogent if the recently-enacted section 36a, 1980, c. 34, s. 2(1), requiring the inclusion in a collective agreement, at the request of a trade union, of a

provision effectively requiring all members of a bargaining unit to share equally the costs of their agent, is to maintain its integrity. It is the view of the Board that a conviction or belief, to be "religious" within the meaning of the section, must in some way relate to the more orthodox view of "religion" prevalent in the community. That is, the beliefs must relate to the Divine (in some form) and man's perceived relationship to the Divine, rather than to concepts which deal only with man-made institutions, and the relationship of men *inter se*. As the High Court of Australia noted in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943), 67 C.L.R. 122 at pages 123 and 124, in defining the statutory limits on freedom of religion:

It is true that in determining what is religious and what is not religious the current application of the word 'religion' must necessarily be taken into account.

This is not to say, of course, that moral precepts may not form an important part of any religion. As the Court observed in *Anderson*, 9 O.R. (2d) 341:

It is trite to say that in some circumstances, or with respect to some individuals, matters of morality might well be quite separate and distinct from matters of religious belief. However, it does not follow that a matter of individual morality and conscience may not for some individuals be an important element or tenet in the religious convictions of belief.

Indeed, it might be argued that religion has no greater importance than in the moral precepts which it imparts, and on the basis of which an individual carries out his daily life. The Board is simply observing that the use of the term "religious" in section 39 appears to require more than merely a code of behaviour or system of worldly standards, standing alone. As McRuer C.J.H.C. noted in dealing with the related word, "creed", in *Trenton Construction Workers Association, Local No. 52 v. Tange Company Limited*, 63 CLLC 15,459:

Whatever meaning one gives to the word "creed" it must involve a declaration of religious belief. Religious belief, theology and standards of ethical or social conduct are all very different things.

Nor is it sufficient for an applicant simply to state that his worldly standards evolve from his concept of God and God's will. It is the task of the Board to satisfy itself that this is the case.

28. The threefold tests established in the *Wybenga* case, *supra*, must now be applied to the situation of these applicants. The respondent has not taken the position that these applicants' views are not sincerely held and indeed, the applicants' sincerity was evident to the Board at the hearing. Therefore, the first aspect of the test has been fulfilled by both applicants. We may now turn to a consideration of the second and third aspects of the test with regard to each application.

### Mary Geyer

29. Her objection to the payment of dues stems first from her opposition to abortion and the OPSEU's association with the OFL's stand on abortion. Her objection is also based on her unwillingness to be associated with an organization that is not dedicated to God. It is true that her concern about abortion arose because of her understanding that OPSEU had adopted the OFL's position on abortion. The evidence of Mrs. Jones makes it clear that OPSEU, as an organization, had not taken a formal position with regard to the OFL resolution. This makes the situation similar to that in the applications of Mr. Schochet in *Humber College*,

[1983] OLRB Rep. Sept. 1472 and the *Ontario Public Service Employees Union and Forere*, [1984] 46 O.R. (2d) 789 (Ont. Div. Ct.). In those cases, OPSEU's mere affiliation with an OFL resolution absent an official stand taken by OPSEU on a particular issue, was held to be too remote to be a foundation for a religious objection to membership. However, the evidence in the case before this Board is different. In this case, OPSEU had taken a formal position by adopting Resolution 41. This was unknown apparently to Mrs. Geyer. However, Mrs. Geyer would find herself in a position of paying dues to support a union which had formally adopted a position on abortion that is diametrically opposed to her own. However, she admitted that she would have no problem in this regard if she could be convinced that OPSEU had not spent any money in support of abortion or its position on abortion. The evidence of the union did not satisfy her that this was the case. Thus, she maintained the application.

30. Her position should then be compared to that of Mr. Tremblay in the case of *Georgian College of Applied Arts and Technology*, *supra*. In that case, he objected to OPSEU's adoption of Resolution 41. However, he was prepared to allow his fellow union members the freedom of speech and expression on the issue. Therefore, he focused his objection to the expenditure of funds in support of the resolution or as was called for in the resolution itself. He asked only that he be given an exemption from the payment of dues or assessments for the portion of funds which would be spent in accordance with Resolution 41. The Board had sympathy with Mr. Tremblay's position to a certain extent. It concluded at paragraph 15:

All that the applicant's position demonstrates is that the focus of his conflict is a narrow one. But if that conflict is as irreconcilable and as fundamental to the applicant's beliefs as we find to be the case here, we find no basis for concluding that the applicant's predicament does not fall squarely within the class of cases for which the exemption has been made available.

Since the union had been able to satisfy the Board that time and funds had not been spent on the resolution, it was held that the specific application was premature. The application was then dismissed, without prejudice to Mr. Tremblay's right to refile should "further developments warrant" or should it be able to be established that funds were indeed being spent in support of the resolution.

31. Insofar as the abortion issue is concerned, the Board can see no distinction between the situation of Mr. Tremblay or the applicant. Again, the Union has been able to establish in this case that no funds have been spent in support of the position on abortion thus, in that regard the application must be considered to be premature.

32. However, Mrs. Geyer's position is different from that in the *Georgian College* case in that this objection is also based upon her concern about supporting an organization that is not dedicated to God. Her sincere and religious beliefs tell her that she cannot support an organization that is not dedicated to God or does not align itself with God's teachings. It is true that she admits that she could join a community club or sports club, but she distinguishes this by saying it would not offend her if it did not contradict the Bible. But her belief is that the OPSEU Constitution, by supporting strikes and requiring an oath to be sworn which does not refer to God, contradicts the Bible. The Board does not sit in judgment of the reasonableness of this belief. Instead, the Board determines whether the belief falls within section 47 of the Act. There may be cases where a distinction can be drawn between an applicant's objection to joining and to supporting a union through the payment of dues. But such a distinction cannot be drawn in Mrs. Geyer's case. To Mrs. Geyer, the supporting of



a union financially affiliates her with an organization that is in irreconcilable conflict with her religious beliefs because it is not dedicated to God and she believes it could call upon her to act contrary to God's teachings. These sincere and religious beliefs are the cause for her objection to supporting the Union. Therefore, she falls squarely within the intent of section 47 of the Act.

Barbara Hall

33. All the above comments with regard to the question of abortion apply equally to Mrs. Hall. Thus, if the application was based solely upon the opposition to abortion, the claim would have to be considered premature. But, Mrs. Hall's other reason for not wanting to pay dues relates to the union's position of defending the right to strike in its Constitution. As stated above in the *Anderson* case, a religious objection based on the defence of the right to strike has been upheld.

34. But in the application of Mrs. Hall, the real cause for concern as to whether the exemption ought to be granted is why it took her so long to resign from the union and seek this exemption after having been active in an association and signing up for membership in OPSEU herself. It is clear that Mrs. Hall is an intelligent woman. She knew when she joined the union that it would seek to protect the right to strike. It then took her seven months to resign. It is clear that in the meantime she was dissatisfied with the persons administering the Local and the procedures which were being adopted by the Local and OPSEU. The Board has scrutinized carefully whether or not this dissatisfaction was in fact why she no longer wishes to support the union or pay dues.

35. But the Board is satisfied that the real motive for this application came from Mrs. Hall's resolution of her internal struggle that she suffered while she was trying to reconcile her idea of the scriptures with the concept of the union. This was a difficult struggle for her. It put her in opposition with her family and her friends. Over that seven-month period, she tried to decide whether her membership in the union was in contradiction with her religious beliefs. She methodically sought out information from the union and the OFL to ensure that her decision would be based on facts rather than conjecture. She ultimately determined that her view of Christianity was inconsistent with the aims of the union and with the union's stand on abortion.

36. Section 47 does not demand that applicants remain of a fixed mind with regard to their religious beliefs. Applicants are entitled to change their minds or their positions as they evolve as human beings. A change in position can suggest a lack of sincerity or belief, especially when other anti-union motivations are present. But here, the sincerity of Mrs. Hall was not challenged by the union and indeed the Board was convinced of her sincerity as well. Further, in *General Motors of Canada Ltd.*, [1972] OLRB Rep. Feb. 132, the Board held that the religious objection need not be the sole ground for objection. Here, Mrs. Hall may well have had a dual motivation in that she was also concerned with how the union was being administered. This would not entitle her to an exemption under section 47. But the Board has been convinced by Mrs. Hall's testimony that her religious objection to OPSEU's defence of the right to strike was a primary reason for her desire not to support the union.

37. Again, like in the case of Mrs. Geyer, financial support of this union would put

Mrs. Hall in a position of conflict by supporting an organization that is opposed to her understanding of the scriptures. The union did not deny that dues could be used to support a strike. Thus, it could not be said that her dues could be protected from the support of the union's position on strikes. While this was not specifically mentioned by Mrs. Hall herself, it is only one example of how payment of dues would put her in an irreconcilable conflict of religious beliefs. Therefore, we must conclude that Mrs. Hall's sincere religious beliefs are the reasons for her objection to the payment of union dues.

### Conclusion

38. For all these reasons, the applications of Mrs. Geyer and Mrs. Hall are allowed. The Board orders that Article 3.01 of the collective agreement does not apply to the applicants and that they cannot be required to pay any dues, fees, or assessments to the respondent trade union, provided that the amounts equal to such dues or other assessments are paid by the applicants or remitted by the Board of Education to a charitable organization mutually agreed upon by the individual applicants and the union. If such agreements are not reached, this Board remains seized of the matter of designating the charity in accordance with section 47(1) of the Act.

### **DECISION OF BOARD MEMBER P.V. GRASSO;**

1. I must dissent from the conclusion reached by my colleagues.
2. As may be seen from the majority's review of the facts and evidence, the two applicants advance similar reasons in support of their request for an exemption from the union security clause of their collective agreement. Mrs. Hall bases her application upon her views that her union's resolution in support of liberalized abortion laws and facilities is incompatible with her religious beliefs, and that the actual or contemplated use of the strike in pursuit of collective bargaining goals is contrary to Scripture. Mrs. Geyer bases her application upon the same views, as well as her view that she cannot belong to or support a trade union that does not expressly acknowledge God in its constitution or oath.
3. In my opinion, section 47 of the Act granting religious exemption from union security provisions was enacted for a very limited purpose. Union shop and agency shop clauses are in wide use in collective agreements in this Province. The primary purpose of clauses requiring employees in a unit to either join or remit dues to their union is to strengthen the union is its role as exclusive bargaining agent. The mandatory check-off of dues gives all employees in a unit a stake in the collective bargaining process. It also eliminates "free-riders" by requiring all employees who benefit from union representation to bear their fair share of the costs of representation. The Legislature has historically tolerated these clauses, and has even given agency shop clauses legislative approval by enacting s.43, which gives unions the right to an agency shop clause in a collective agreement upon request. I believe that it is a measure of the importance placed by the Legislature upon the principle of equitable distribution of collective bargaining costs that it recognizes a *bona fide* religious objection as the only allowable exception to the rule.
4. Section 47 of the Act reads:

47.-(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union, the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement.

What is notable about the section is, first, that by the operation of subsection (2) a religious exemption from payment of dues is valid only where an objector was already employed by the employer when the dues check-off clause first came into effect. The Act does not give a religious objector the right to avoid payment of dues where he entered his employment in the knowledge a union or agency shop was in effect. This limitation emphasizes the high value placed by the Legislature on the agency shop as a method of achieving equity in distribution of the financial burden of collective bargaining. Second, subsection 1 only gives the Board the power to order that the agency or union shop provisions of a collective agreement do not apply to the objector and that the objector is not required to pay “any dues, fees or assessments” to the trade union. I take the natural meaning of the subsection to be that the Board has no jurisdiction to grant a partial exemption from payment of dues. In other words, an application for religious exemption from payment of dues is an “all-or-nothing” proposition, and should not be granted lightly.

5. Given the Legislature’s strong approval of the principle behind union security clauses, and the absence of any power in the Board to grant partial exemptions from payment of dues, it seems to me grossly unfair that an employee might be allowed to escape payment of all dues when his religious objection is directed against one particular action or one particular program of the union. If the Legislature had intended that religious objectors be allowed to withhold dues on the basis of objections to non-collective bargaining actions of the union, surely it would have granted the Board power to apportion an objector’s dues between objectionable and non-objectionable purposes and grant an exemption for the latter only. This leads me to conclude that section 47 is intended to apply only where the applicant’s objection relates to unionism in general or to the particular union acting in its role as exclusive bargaining agent. Only objections of this type are so fundamental and irreconcilable that they can justify the total exemption from dues, fees, assessments and membership contemplated by the Act.

6. Up to this time the Board has analyzed applications for exemption from union security clauses on the ground of religious objection by asking the questions set out in *Helena Wybenga*, [1976] OLRB Rep. Aug. 422: are the applicant’s beliefs sincerely held? Are they



religious? and are they the cause of the objection to paying union dues? Until very recently these tests were perfectly adequate for deciding the question. Applications under section 47 have almost always been based on religious objection to the idea of withholding labour to achieve collective bargaining aims, to the interposition of the union as an intermediary between employer and employee, or to the confrontational nature and secular aims of trade unionism. These are objections that go to the fundamental nature of trade unionism or the individual union acting as bargaining agent. But the Board has recently begun to encounter applications based on religious opposition to particular actions taken by the union in its role as political and social interest group. In *Jacob Immanuel Schochet* [1983] OLRB Rep. Sept. 1472, the applicant took issue with a resolution of the Canadian Labour Congress expressing support for the Palestine Liberation Organization. In *Paul Tremblay* [1984] OLRB Rep. Feb. 247, as in the present case, the applicant relied on his opposition to an OFL resolution favouring liberalization of abortion law and policy in Canada. This trend concerns me greatly. If the Board adopts an interpretation of section 47 of the Act that allows exemptions for religious objections to such non-essential activities of a trade union, unions will be deprived of 100% of objectors' dues, even though the objection may relate to a minor element in the union's activities, and even though the objection may not be incompatible with the union's representation of the objector in collective bargaining. I cannot believe that the Legislature intended such a result. When a union takes a position in a political or social issue not directly related to collective bargaining, employees dissenting on that issue have recourse to the internal democratic processes of the union. If the union maintains or commits funds to its position in the face of vigorous opposition within its constituency, it will pay the price of alienating a portion of that constituency, with the implications that holds for the union's continued bargaining rights. It is surely a remedy out of all proportion to the offense that the union has given to an objector's religious conscience that it should be deprived of all the objector's dues, even the portion devoted to perfectly legitimate, non-controversial collective bargaining purposes.

7. The adoption of an interpretation of section 47 that renders unions vulnerable to religious exemption applications founded on opposition to union resolutions on social and political issues is all the more unfortunate where, as here, the offending OFL resolution was voted onto the agenda from the floor against the recommendation of the convention executive and passed in a free vote of the delegates. It would be an unhappy development if unions or their umbrella federations were forced to close their convention agendas and limit the free flow of debate to avoid generating a rash of religious exemption applications based on non-collective bargaining issues.

8. Accordingly, it is my view that the applicants' objection to the union's position on abortion is not capable of supporting the exemption claimed, even if it could be shown that the union actually spent a portion of its revenues from dues on promoting its position.

9. I would also conclude that Mrs. Geyer's objection that the union's constitution and oath do not make explicit reference to God is not capable of sustaining an application for exemption from dues. Section 47(1) of the Act gives a *discretion* to the Board to order that an agency shop clause not apply where a religious objection to payment of dues has been established. I think it a proper exercise of this discretion that the Board not allow an expressly - religious objection to a union policy of religious non-affiliation to be grounds for an application for exemption from dues. A trade union is an organization open to and representing individuals of all beliefs without discrimination. It is required to be so by section 13 of the Act, which states:

13. The Board shall not certify a trade union... if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

It is entirely in keeping with the non-sectarian spirit of trade unionism as mandated by section 13 that a union not express a religious principle in its constitution or oath. If a union were to declare adherence to a certain religion or religious belief, it might well face religious exemption applications from non-adherents. Is it then to be subjected to similar applications from adherents of a particular religious belief because it has adopted a studied position of non-adherence in its constitution and oath? I think not. The Act should not be interpreted in a way that places a trade union in a "no-win" situation between the demands of certain unit members for a declaration of religious affiliation or adherence on one hand, and the principles of non-discrimination and non-sectarianism that are fundamental to both the concept of an exclusive bargaining agent and public policy in general. As a matter of policy, therefore, an objection to a union's non-expression of a sectarian principle should not be allowed to found a religious exemption from a union security clause.

10. The rationale for this approach is even stronger in an agency/shop situation, as here. The union oath applies to members only, and the constitution primarily regulates relationships between union members. Mrs. Geyer is not a member, nor is she required to be by the collective agreement in question. Mrs. Geyer would therefore appear to have no direct interest in what the union does or does not proclaim in its internal instruments, and it would be even more incongruous that her objection, however sincere, be given effect. If the union were actually to *do* something in its role as bargaining agent that offended her sincere belief in the primacy of God, the situation would probably be different. Section 47 of the Act, however, is intended to provide an avenue of relief where an employee experiences a direct and irreconcilable conflict between his religious conscience and his legal and contractual obligations as a member of the bargaining unit. A union's failure to declare a religious principle should not be recognized by the Board as a fact raising a conflict of this type.

11. Having concluded that the foregoing objections cannot support an exemption from dues under s. 47 of the Act, both applications stand or fall on the applicants' belief that the union's actual or contemplated resort to strike action for collective bargaining purposes is contrary to the word of God. On the whole of the evidence, I am not satisfied that this belief is the cause of the applicants' objections to paying union dues. Mrs. Geyer in cross-examination admitted that payment of dues was not necessarily a problem for her if no dues money was being spent on the union's abortion position. This admission together with the relatively superficial treatment this belief received in Mrs. Geyer's testimony leads me to conclude that it did not contribute to her objection to paying union dues.

12. In Mrs. Hall's case, the contention that her objection to payment of dues was caused in part by religious belief in the wrongfulness of strike action is undermined by her previous membership in OPSEU and her expression of dissatisfaction with the union. While I agree that an individual's beliefs may change over time for the purposes of section 47, an expressed change of beliefs should be scrutinized carefully by the Board, especially when it coincides with a general deterioration of the relationship between the applicant and the union. In this case I must say that Mrs. Hall's expressed change of beliefs has not been made out to be a factor in the development of her opposition to financially supporting the union. Mrs. Hall must have joined the union with the knowledge that it would support the right to strike. I cannot help but feel that it is more than a coincidence that Mrs. Hall undertook a prolonged (seven

months) re-examination of her religious beliefs about unionism at exactly the same time as the abortion controversy was “heating up” within her union, and at the same time as she developed a concern over internal administration of her local sufficient to cite representatives’ “dishonesty” as a reason for her resignation from membership. In my view, Mrs. Hall’s objection to strike action must be seen as a rationalization of an existing antipathy to her union rather than an independent change of personal religious belief.

13. It therefore follows that none of the objections advanced by the applicants support the granting of an exemption from payment of dues pursuant to section 47 of the Act. In my view the sincere religious objections established by the applicants relate to matters properly outside the scope of section 47 of the Act. I would dismiss the applications.

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**0485-84-R; 0486-84-U** Retail, Commercial & Industrial Union, Local 206 (Chartered by the United Food and Commercial Workers International Union), Applicant/Complainant, v. **J. Pascal Inc.**, Respondent

**Certification Where Act Contravened - Interference in Trade Unions - Unfair Labour Practice - Employer engaging in one-on-one discussions about union with individual employees - One-on-one discussions held to be unlawful interference although content of discussion not coercive or threatening - Board finding circumstances not appropriate for certification without vote**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *F. W. Murray* and *J. F. Kennedy*.

**APPEARANCES:** *Daniel V. MacDonald* and *Richard Frechette* for the applicant; *D. I. Wakely*, *Silvio Pittarelli* and *Sydney Pascal* for the respondent.

**DECISION OF THE BOARD;** July 22, 1985

1. File No. 0485-84-R is an application for certification. File No. 0486-84-U is a complaint under section 89 of the *Labour Relations Act* which alleges that the respondent violated sections 64, 66 and 70 of the Act.

2. The parties are in agreement that all employees of the respondent at its hardware store at 1250 South Service Road, Mississauga, save and except manager, assistant manager, area co-ordinators and persons above the rank of area co-ordinator, constitute a unit of employees appropriate for collective bargaining. On the date of the filing of the application there were 52 employees in the bargaining unit. The applicant filed evidence of membership with respect to 17, or approximately 33 per cent, of these employees. Generally, this level of employee support for an applicant trade union would result in the application being dismissed. However, the applicant contends that it is entitled to be certified pursuant to the extraordinary certification procedure set forth in section 8 of the Act, which provides as follows:



Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

3. In order for the applicant trade union to be certified pursuant to the provisions of section 8, it must demonstrate that the respondent has violated the Act, and that the true wishes of employees are not likely to be ascertained in the normal certification procedures. The alleged breaches of the Act relied on to support the section 8 application are the same alleged violations of the Act referred to in the section 89 complaint.

4. The union's organizing campaign was conducted by Mr. Richard Frechette. Between July 1983 and April 1984 Mr. Frechette worked for the respondent as an area co-ordinator at its store on the South Service Road in Mississauga. This was a managerial position. Mr. Frechette left the company's employ on April 14, 1984 because the work he was doing aggravated an existing spinal problem. He commenced organizing for the union on April 17, 1984. This was his first organizing campaign. Mr. Frechette testified that by April 27th he had contacted approximately 25 or 30 employees by telephone and subsequently met with a number of these employees. Subsequent to April 27th, Mr. Frechette re-contacted several of the employees he had contacted earlier. At one point in his testimony Mr. Frechette stated that after April 27th he did not contact any additional employees. Later, however, he changed this to say that he had telephoned "some" of the other employees. According to Mr. Frechette, in addition to himself there were four "in store" employees who spoke to employees about the union, but he alone had possession of union membership cards for employees to sign.

5. Management first became aware of the union organizing campaign on April 23, 1984 when Mr. Bill Wilson, the regional supervisor for the respondent's hardware stores in the greater Toronto area, received an unsigned note stating that Mr. Frechette was organizing for a union. After discussing the note with Mr. Greg Cuthbert, the manager of the Mississauga store, Mr. Wilson decided that he should investigate the source and accuracy of the note. Mr. Wilson commenced his investigation by discussing the note with Mr. Archie Ross, a full-time employee. Mr. Wilson assumed that Mr. Ross had either written the note or knew who had. Mr. Ross is a graduate of the business administration course at Humber college. He had previously come to the attention of management as a hard-working, conscientious employee. Unbeknownst to management, Mr. Ross had in fact been the first employee to sign a union card.

6. About 3:00 p.m. on April 23rd, Mr. Ross was called in to meet with Mr. Wilson and Mr. Cuthbert. Mr. Wilson asked Mr. Ross if he had been the one who had written the note about Mr. Frechette organizing a union. Mr. Ross replied that he had not. Mr. Ross then asked why he had been the one asked about the note, to which Mr. Wilson referred to Mr. Ross' work performance and commented that he understood that Mr. Ross was aspiring to advance with the company. Mr. Ross testified that during this meeting there was also a discussion about his having joined the union. Mr. Wilson, however, testified that the discussion relating to Mr. Ross having joined the union occurred later that day. Given what we believe

to have been the more logical sequence of events, we feel it likely that this matter was not, in fact, discussed at this initial meeting.

7. Later on in the afternoon of April 23, 1984, Mr. Wilson called Mr. Ross back into his office. Mr. Wilson advised Mr. Ross that he now knew that Mr. Frechette was organizing on behalf of a union. Mr. Wilson then noted that Mr. Ross had worked in close proximity to Mr. Frechette and asked him if he knew anything more about the unsigned note. What occurred next is in dispute. According to Mr. Wilson, Mr. Ross indicated that he knew nothing about the note, and then went on to comment that in a prior job he had been represented by a union, that he had studied unions, and that, in his view, unions were the thing of the future. Mr. Wilson testified that he responded by saying that Mr. Ross obviously knew more about unions than he, and that he then cut the meeting short. Mr. Wilson insisted that he had not asked Mr. Ross if he had signed a union card, and Mr. Ross had not volunteered the information. Indeed, stated Mr. Wilson, he told Mr. Ross that he was not interested in knowing who had signed. As already indicated, Mr. Ross' version of this part of their conversation is somewhat different. According to Mr. Ross, Mr. Wilson asked him if he was a member of the union or if he had been approached by Mr. Frechette about joining the union, and he replied in the negative. According to Mr. Ross, Mr. Wilson also asked if he had been a union "plant", which Mr. Ross denied being.

8. About 3:00 o'clock in the afternoon on the following day, April 24, 1984, Mr. Ross met with Mr. Silvio Pittarelli, the director of operations for the respondent's hardware division. Mr. Pittarelli is based in Montreal, although, on occasion, he visits the Mississauga store. According to Mr. Ross, he was asked by another employee if he would like an opportunity to meet with Mr. Pittarelli, and since he did, he went to the office that Mr. Pittarelli uses when at the store. Mr. Pittarelli testified that as far as he was aware, Mr. Ross simply came in to see him. Both Mr. Ross and Mr. Pittarelli testified that Mr. Ross asked Mr. Pittarelli if he had a list of employees who had joined the union, to which Mr. Pittarelli said that he did not. According to Mr. Ross, Mr. Pittarelli added the comment that he had a good idea as to who had joined the union. Mr. Pittarelli, however, testified that what he said was that he did not want to know who had joined. It was the evidence of both Mr. Ross and Mr. Pittarelli that without being asked and without any prompting, Mr. Ross advised Mr. Pittarelli that he had joined the union, and that Mr. Pittarelli asked why he had done so. According to Mr. Ross, he told Mr. Pittarelli that he felt a union would sharpen up management, to which Mr. Pittarelli responded that in some instances a union could be beneficial. Mr. Ross indicated that he had talked to Mr. Pittarelli voluntarily, and had not felt intimidated by him.

9. Mr. Wilson testified that he had heard rumours about mis-information being given to employees as part of the union's organizing campaign, and, accordingly, he took steps to assure employees and also to learn the scope of the rumours. According to Mr. Wilson, he spoke about the rumours to 8 or 10 employees. From Mr. Wilson's evidence, it appears that he only spoke with employees on April 24, 1984. One of the employees Mr. Wilson spoke with was Miss Diane Crisman, a part-time employee. Miss Crisman's version of their conversation was as follows: Mr. Wilson asked her whether she had been contacted by anyone concerning the union, and she replied that she had not. Mr. Wilson then advised her that she might be contacted soon, and if she was, she was to listen, not make any rash decisions, and talk with her dad. Mr. Wilson stated that if a union came in, employees would lose their Christmas bonus and sick pay. When being cross-examined, Miss Crisman agreed that Mr.



Wilson had stated that if a union came in, wages and benefits would be negotiated, but she repeated her contention that Mr. Wilson had expressly claimed that employees would lose their sick pay and Christmas bonus. Mr. Wilson's version of the conversation was somewhat different. Mr. Wilson testified that what he said to Miss Crisman was that he was aware of certain rumours and that he was talking to employees to assure them the company was not taking any action against employees as a result of them being for or against the union. According to Mr. Wilson, he advised Miss Crisman that some employees were afraid of losing benefits but he believed that benefits would be negotiated. Mr. Wilson denied saying that if the union came in, the company would remove the Christmas bonus or sick pay. Indeed, claimed Mr. Wilson, he had stated that as far as he knew, the respondent had not in the past taken anything away from employees.

10. On April 26th, Mr. Wilson asked Miss Crisman if she would speak with Mr. Pittarelli, which she agreed to do. There was a substantial degree of conflict between the testimony of Miss Crisman and Mr. Pittarelli concerning their discussion. Miss Crisman testified that Mr. Pittarelli asked her if she had joined the union, and she responded that she had. According to Miss Crisman, Mr. Pittarelli then asked why she had joined and she indicated that, as a part-timer, she did not have a complete medical plan, a matter of some importance to her since she was diabetic. Miss Crisman further testified that Mr. Pittarelli stated that if the union came in, benefits such as a Christmas bonus and sick pay would be taken away. She claimed that Mr. Pittarelli stated that he had a list of all the people who had joined the union. For his part, Mr. Pittarelli testified that near the commencement of the meeting, Miss Crisman told him that she should have listened to her mother, and stayed away from unions, but that she had signed a card. According to Mr. Pittarelli, he did not ask Miss Crisman if she had signed a card, although he acknowledged that he did ask her why she had signed. According to Mr. Pittarelli, in response to this question, Miss Crisman first smiled broadly, revealing that she wore braces, and then stated that she had been advised by Mr. Frechette that, with the union, part-timers would have a dental plan. Mr. Pittarelli stated that he responded to this with the comment that he doubted if any company had a dental plan for part-timers, and that if Mr. Frechette had promised one, she should get the promise in writing. With respect to benefits generally, it was Mr. Pittarelli's evidence that he advised Miss Crisman that it was not the company's policy to reduce benefits, although it was company policy to provide equal benefits to unionized and non-unionized employees.

11. On April 26, 1984, Mr. Cuthbert, the store manager, approached David Ricchezza, a part-time employee, who is also a student at the University of Toronto. According to Mr. Ricchezza, Mr. Cuthbert asked if he could advise him concerning the company position respecting unions, and Mr. Ricchezza replied that he would listen. Mr. Ricchezza testified that Mr. Cuthbert advised him that the company did not wish to have a union, and that it did not feel that employees needed one since they were receiving fair wages and benefits, and that the company could not afford higher wages. Mr. Ricchezza stated that Mr. Cuthbert did tell him that whether he believed in a union or not, he should fight for what he believed in and not sit on the fence. The conversation ended with Mr. Cuthbert asking Mr. Ricchezza if he would like to meet with Mr. Pittarelli, and Mr. Ricchezza replying that he would. According to Mr. Ricchezza, during this discussion Mr. Cuthbert did not ask him if he had signed a union card.

12. Later on April 26th, Mr. Pittarelli had a meeting with three employees, namely Mr. Ricchezza, Mr. Vince Fiorella, a part-time employee, and Miss Pat Diamantopoulos. Miss



Diamantopoulos was the president of an employee “good will” committee. She was not a union supporter. Indeed, she had earlier complained to management that Mr. Frechette had telephoned her at home notwithstanding the fact that she had an unlisted telephone number. It was Mr. Pittarelli’s evidence that he had been asked by the management of the Mississauga store if he would meet with some employees, and that later the three employees came to see him. Miss Diamantopoulos, however, stated that she had been paged to the meeting. As noted above, Mr. Ricchezza had been asked by Mr. Cuthbert if he would meet with Mr. Pittarelli, and Mr. Ricchezza agreed to attend the meeting. Mr. Fiorella did not testify and we do not know how he came to attend the meeting.

13. Mr. Pittarelli, Miss Diamantopoulos, and Mr. Ricchezza testified with respect to the meeting. Each gave differing versions of what was said. Mr. Pittarelli testified that he was asked by one of the three employees if the company had a union, to which he replied that company employees in Quebec had a union from 1966 to 1976 when they voted it out. According to Mr. Pittarelli, he noted that the employees at a company store in Three Rivers were currently represented by a union, but were legally locked out. Mr. Pittarelli stated that Miss Diamantopoulos commented that the company could rid itself of a union by giving more money and benefits to employees in non-union stores, to which he replied that the company would not do such a thing, and that the company had not taken away employee benefits in 81 years. Mr. Pittarelli testified that he advised the employees that at one time the company had operated two stores in Quebec City, one where the employees were represented by a trade union and the other where they were not, and that employees at both stores had received the same wages and benefits. According to Mr. Pittarelli, Miss Diamantopoulos raised the possibility of unions using “goons”, to which he replied that he had heard of situations where goons had been used, but this had not occurred at Pascal’s, and further, that it was not to a union’s advantage to use goons to scare employees.

14. In cross-examination Mr. Pittarelli denied that he had stated that if the issue of union representation went to a vote among the employees, the company would learn who had signed for the union. He testified that there had been a discussion as to the degree of employee support required for the union to be certified, and in connection with this discussion an employee had asked if a vote might be held, and, if so, who could vote. According to Mr. Pittarelli, he had replied that a vote might be held, and that if this happened, the company would produce a list of employees entitled to vote. Later, when being re-examined by company counsel, Mr. Pittarelli added that he had also stated that anyone (presumably meaning Mr. Frechette) could claim to have possession of signed union cards, but at some point he would have to produce the cards and match them against a list. Mr. Pittarelli stated that one employee asked what would happen if someone who had signed a union card wanted to resign from the union, and he replied that on his return to Montreal he would find out about this from the company’s human resources department. Mr. Pittarelli testified, however, that he had not subsequently spoken to any Mississauga employees about resigning from the union.

15. It was Miss Diamantopoulos’ testimony that at the meeting Mr. Ricchezza asked if employees would lose any benefits if the union got in, and Mr. Pittarelli responded that when a store in Three Rivers was organized, no benefits were removed. According to Miss Diamantopoulos, she then made the comment that she had been working at another company when it was organized, and when this happened, management took away certain benefits. Miss Diamantopoulos testified that at the meeting Mr. Pittarelli did not ask who had joined the union, although he did state that if the issue of the union came to vote, the company

would find out who were union supporters since the employees would have to write their names. Miss Diamantopoulos also claimed that Mr. Pittarelli had stated that he would talk to a lawyer in Montreal about employees resigning from the union, although he did not try to persuade anyone to resign.

16. It was Mr. Ricchezza's evidence that at the meeting in question Mr. Pittarelli stated that the company did not wish to have a union in the store, and if a union came in, employees would lose their Christmas bonus, and other benefits. Later in his testimony, Mr. Ricchezza agreed with the suggestion that the issue of the Christmas bonus was raised when Miss Diamantopoulos mentioned that a previous employer of hers had removed certain employee benefits, including a Christmas bonus, when a union came in. According to Mr. Ricchezza, Mr. Pittarelli then made the comment that a Christmas bonus is not a right, and that with a union the company would not have to give it. Mr. Ricchezza also testified that Mr. Pittarelli claimed that the company had closed a Montreal store because the union had not negotiated fairly. (The evidence is that the company had not closed any stores in Montreal. Mr. Ricchezza may have been referring to the store in Three Rivers where employees had been locked out.) According to Mr. Ricchezza, Mr. Pittarelli stated that one way the respondent could get rid of a union would be to give higher wages and benefits to employees in non-union stores. Mr. Ricchezza testified that Mr. Pittarelli made the comment that although the company did not know who had joined the union, it would find out since, by right, the company would get a list of union members, and if anyone present had joined a union, they should say so because the company would find out anyway. According to Mr. Ricchezza, Mr. Pittarelli made the statement that employees could write a letter to the union to resign, or do it by way of a "petition" signed by all employees who wished to resign, and that he would talk to his lawyer in Montreal to see if the lawyer could draft a letter for the employees.

17. Mr. Ricchezza testified that during the meeting he stated that he had received less than a five per cent wage increase. Mr. Pittarelli then looked at a blue card detailing wage increases which was available to employees and stated that Mr. Ricchezza was to get an increase in July. In fact, employees in Mr. Ricchezza's classification had received their once-a-year increase in January of 1984, although certain other part-timers were to get an increase in August. In his testimony Mr. Ricchezza indicated that he did not view Mr. Pittarelli's comment as an attempt to bribe him, but rather the result of a misunderstanding as to when employees in his particular part-time classification would next get an increase.

18. On or about May 10, 1984, employees were advised that those who wanted to could listen to a speech by Mr. Sydney Pascal, the president of the respondent. Mr. Pascal spoke at two different times, each time reading from a prepared speech. This speech was not put into evidence and Mr. Pascal did not testify. From the evidence of employees who did testify, it appears that Mr. Pascal stated that the respondent's employees received wages and benefits above average for the industry. Mr. Pascal also commented that the respondent had a policy of not allowing one store to rise above the others with respect to wages and benefits. Mr. Pascal stated that employees in Montreal had been represented by a union for 10 years, but had then decided they did not need a union. During one of Mr. Pascal's speeches, an employee asked about the Christmas bonus, to which Mr. Pascal replied that it was a matter that would be negotiated between the employer and the trade union. There was also a question from an employee as to whether Mr. Pascal had a list of union members. Mr. Pascal replied that he did not, and that he did not want to know who had joined the union so that he could not later be accused of treating them unfairly.

19. As already noted, 17 employees signed union membership cards. The cards are all dated between April 17th and April 26th. Mr. Frechette testified that on April 27th, he held a general meeting at the Marco Polo Hotel for employees at both the Mississauga store and another Pascal store in Brampton. Two employees attended, both from the Mississauga store. One of these employees had already joined the union. The other employee never did join. After this meeting, Mr. Frechette re-contacted several employees who had earlier declined his invitation to join the union. As already noted, at one point Mr. Frechette stated that he had not contacted any additional employees after this date, although later he stated he had contacted "some" additional employees by telephone. In giving his evidence, Mr. Frechette blamed his inability to get additional employees to sign union cards on the action of management. However, when asked in cross-examination if his lack of success may have been due to a lack of contact with employees, Mr. Frechette replied that this might have been one of the reasons.

20. The union contends that the actions of the various officials of the respondent violated sections 64, 66 and 70 of the Act. These sections provide as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

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66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

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70. No person, trade union or employer's organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

21. This is not a case where it is alleged that union supporters were discharged or



penalized in any way. Rather, the union relies solely on the statements made by management officials. The Act does not require that an employer stay neutral during a union organizing campaign. To the contrary, section 64 expressly states that nothing in the section “shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, threats, promises or undue influence”. Where the difficulty arises is in trying to draw the line at which an expression of views by an employer becomes “coercion, threats, promises or undue influence”, which are prohibited by the section. As noted in the *Dylex Limited* case, [1977] OLRB Rep. June 357, in seeking to establish where the line lies, the Board starts with the presumption that employees recognize that employers are generally not in favour of having to deal with employees through a trade union, and that, therefore, it ought not to surprise them if their employer indicates that he would prefer it if they did not support the union. On the other hand, however, the Board is also aware that an employee may be particularly vulnerable to employer influences. An employer cannot, when expressing his views, make statements that may be reasonably construed by employees to be an attempt by means of coercion, intimidation, threats, promises or undue influence to interfere with their freedom to join and support a trade union of their choice.

22. The union contends that Mr. Pascal’s statement that he did not want to know who had joined the union so he could not be accused of treating the individuals involved unfairly, was a breach of sections 64 and 70 of the Act. According to the union, Mr. Pascal’s comment implied that had he known who was a union member, it would have coloured his judgment with respect to those employees. We do not agree. In our view, his statement was likely meant to be nothing more than an indication that Mr. Pascal did not want to know who had joined the union.

23. The union also takes issue with certain statements made to employees by Mr. Wilson and Mr. Pittarelli. The union claims that both of them advised employees that if the union came in, they would lose certain benefits. It will be recalled that Miss Crisman testified that she was advised by both Mr. Wilson and Mr. Pittarelli that if a union came in, employees would lose their Christmas bonus and sick pay. Mr. Ricchezza stated that Mr. Pittarelli made a similar comment when he met with the group of three employees. Mr. Wilson and Mr. Pittarelli, however, denied making any such comment. Mr. Wilson stated that he had told Miss Crisman that benefits would be negotiable and that the company had not taken any benefits away from employees. Mr. Pittarelli testified that he told Miss Crisman and later the group of three employees that the company policy was to have equal benefits in all of its stores and that he had also stated that the company had not removed any benefits. Mr. Pittarelli’s evidence in this regard receives some support from the testimony of Miss Diamantopoulos, who stated that at the meeting with the three employees she was the one who raised the issue of the removal of benefits and that, at the time, Mr. Pittarelli had indicated that no benefits had been removed at Three Rivers when employees there selected a union. We incline to the view that none of the witnesses was deliberately seeking to mislead the Board. Rather, the discrepancies in their evidence result from differing recollections as to what was said, as well as differing conclusions concerning what certain comments meant. In assessing the evidence of the various witnesses with respect to the issue of benefits, we also have in mind the evidence that indicates that the company has not, in fact, removed benefits from employees because they opted for trade union representation, although rumours that this might occur were apparently circulating among employees in the Mississauga store. Taking all of these considerations into account, we are satisfied that at the meeting with the group of three employees, Mr. Pittarelli did not in fact threaten the removal of any benefits, but that, rather, the possibility that this

might occur was suggested by Miss Diamantopoulos, a bargaining unit employee. The situation with respect to what was said to Miss Crisman is less clearcut. However, on balance, we feel that what likely happened was that it was indicated to Miss Crisman that if the union were certified, benefits would be negotiated, and from this comment, as well as the rumours that were circulating about a possible loss of benefits, Miss Crisman reached her own conclusion that benefits would in fact be lost.

24. The union contends that on April 26th Mr. Pittarelli advised the three employees who met with him that if the union came in, employees would be paid less than employees in other stores. The weight of the evidence, however, indicates that Mr. Pittarelli did not make such a statement. Rather, the possibility that this might occur was raised by Miss Diamantopoulos. What Mr. Pittarelli actually indicated was that the respondent had a practice of paying unionized and non-unionized employees the same wages.

25. The union contends that Mr. Pittarelli told the three employees on April 26th that the respondent would be advised as to who had joined the union. The three individuals who gave evidence on this point all said something different. According to Mr. Ricchezza, Mr. Pittarelli claimed to have a list of union members. Miss Diamantopoulos stated that what Mr. Pittarelli said was that if there was a vote, employees would have to write their names. According to Mr. Pittarelli, in response to a question, he stated that if a vote was held, the company would prepare a list of names of eligible voters and that he also stated that at some point the union would have to produce its membership cards and match them against a list. In fact, when a union applies for certification, it must tender its membership cards with the Board. The Board matches the cards against a list of employees supplied by the employer. Throughout the process, the employer is neither shown the cards nor advised which employees have signed cards. If the Board directs the taking of a representation vote, the employer is generally asked to provide a list of employees to serve as a voters' list. Employees, however, vote by way of secret ballots. Their choice is not made known to the employer. Considering the evidence of the witnesses on point, we believe it more likely than not that Mr. Pittarelli stated that the union's cards would be matched against a list, and that if a vote was held, the respondent would provide a list of eligible voters. However, because Mr. Pittarelli did not also advise the employees that the card check is done only by the Board and that any vote would be by way of a secret ballot, the employees, not unreasonably, concluded that the employer would come to know who was a union supporter.

26. Although we are of the view that in their discussions with employees neither Mr. Wilson nor Mr. Pittarelli directly threatened any employee, we are deeply concerned about their conduct in speaking with employees on a one-to-one basis about the union. We do not believe that much turns on the question of whether Mr. Ross and Miss Crisman were actually asked if they had joined the union. It is clear that management engaged them in one-on-one discussions about the union in which management was likely to ascertain whether or not they were union supporters. It is acknowledged that Mr. Pittarelli asked both Mr. Ross and Miss Crisman why they had joined the union. The action of senior management in talking with individual employees about the union and indicating management's opposition to the union likely had a greater impact on the employees than if they had been addressed as part of a larger group or if they had read management's views in a printed letter. In this regard we view as noteworthy Mr. Pittarelli's testimony that at the commencement of his meeting with Miss Crisman, she commented that she should have listened to her mother and stayed away from unions. The implication we gather from this comment is that because of the interest



shown in her by management relating to the union, Miss Crisman concluded that somehow she had acted improperly in involving herself with the union. In our view, the actions of Mr. Pittarelli and Mr. Wilson in engaging in one-on-one discussions with Mr. Ross and Miss Crisman about the union involved an interference with their right to select a trade union. We view their actions as an attempt to unduly influence employees which went beyond the freedom to express their views provided for in section 64 of the Act. In this regard we would adopt the following reasoning of the National Labour Relations Board in the *Peoria Plastic Co.* case, 29 LRRM 1281:

Under the circumstances of this case, we find it unnecessary to determine whether or not, during the course of the private interviews with employees in the unit at their homes, the President and Vice-President of the Company threatened to close the plant or stated that they would never sign a contract with the Union. We find that the cumulative effect of the interviews, which admittedly established Employer's disapproval of Petitioner, held with a majority if not all, employees in the unit immediately before the election, was to interfere with a free choice of bargaining representative regardless of the non-coercive tenor of the Employer's actual remarks. While we have made it clear, that absent unusual circumstances, both Employers and Unions are free to use any legitimate methods of electioneering, we have, at the same time, consistently condemned the technique of calling all or a majority of the employees in the unit into the Employer's office individually or calling upon them at their homes to urge them to reject a union as their bargaining representative as conduct calculated to interfere with the free choice of a bargaining representative regardless of whether or not the Employer's actual remarks were coercive in character.

In all the circumstances, we find that Mr. Wilson and Mr. Pittarelli, and through them the respondent, violated section 64 of the Act. We do not, however, believe that their statements also amounted to violations of sections 66 and 70.

28. We are also of the view that at the meeting with the three employees on April 26, 1984, Mr. Pittarelli breached section 64 of the Act by interfering with the selection of a trade union by employees. Although we are satisfied that Mr. Pittarelli made no threats at the meeting, his comments about employees resigning from the union would reasonably have been viewed by employees as an indication that management was in favour of employees resigning from the union and was prepared to assist them to do so.

29. The remaining issue is whether the respondent's contravention of section 64 has resulted in a situation in which the true wishes of employees are not likely to be ascertained, and, if so, whether the Board should exercise its discretion under section 8 to certify the union notwithstanding the fact that only about 33 per cent of the employees in the bargaining unit have become union members. The circumstances which have in other cases triggered the application of section 8 were reviewed as follows in *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189:

60. The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he has been told by his employer, either expressly or impliedly, and has reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited*, *supra*, *Lorain Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801,



*Sommerville Belkin Industries Limited*, [1980] OLRB Rep. May 791 and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. April 419.)

61. The Board has also applied the section where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice. In these circumstances the Board is forced to the inevitable conclusion that the true wishes of the employees are not likely to be ascertained. (See re *Radio Shack*, *supra*, *K-Mart*, *supra*, *Skyline Hotels Limited*, *supra* and *Robin Hood Multi Foods*, [1981] OLRB Rep. July 972.)

As indicated above, this Board has certified trade unions on a number of occasions pursuant to the provision of section 8 of the Act. The Board is also aware, however, that section 8 is not an appropriate response in every case where an employer had violated the Act. As the British Columbia Labour Relations Board noted in *International Brotherhood of Boilermakers, Local 359 and Torano Limited* (1974) 1 Can. LRBR 13, the certification of a union that has not received majority employee support does entail certain risks:

... Certification without a vote ... creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct ... However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employees through the normal means ... I think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don't want. Undoubtedly, the remedy must be carefully used ...

30. This is not a case where the employer has threatened the job security of employees should they decide to join a trade union. Neither is it a case where the employer has engaged in a pattern of misconduct which would undermine the confidence of his employees in the viability of the Act and the protections afforded them in the exercise of their rights under the Act. In addition, the evidence falls far short of establishing that the employer's conduct brought the union organizing campaign to an end. Apart from the possibility that "some" employees may have been telephoned after this time, it is clear that Mr. Frechette stopped meeting with employees in an attempt to get them to sign union cards. A substantial number of bargaining unit employees were never contacted at all by Mr. Frechette. In our view, this is not a case where it would be appropriate to certify the union pursuant to the extraordinary provisions of section 8.

31. It is the view of a majority of the Board panel (Mr. Murray dissenting) that having regard to the Board's finding that the respondent violated the Act, the respondent should be required to post notices advising employees that the Board has found it to be in violation of the Act and also advising employees of their rights under the *Labour Relations Act*. Accordingly, the respondent is directed to post signed copies of the notice marked "Appendix" to this decision in conspicuous places where they are likely to come to the attention of the employees in the bargaining unit, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced or covered by any other material. Reasonable physical access to the work place shall be given to a representative of the complainant so that the union can satisfy itself that this requirement of posting is being complied with. So as to provide the union with an

opportunity to counter whatever negative effect the conduct of Mr. Wilson and Mr. Pittarelli has had on employees, including employees who may have heard about it second-hand, a majority of the Board also believes it appropriate that two officials of the union be permitted to address all employees in the bargaining unit for at least one hour. The meeting (or meetings) will be held on the respondent's premises during working hours, with no loss of pay to the employees. No members of management will be in attendance. If the parties are unable to reach agreement with respect to the arrangements for the meeting or meetings, they will be set by the Board.

32. In that the applicant filed evidence of membership on behalf of fewer than forty-five per cent of the employees in the bargaining unit, pursuant to section 7 of the Act, the application for certification is hereby dismissed.

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## Appendix

### The Labour Relations Act

# NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT IN DISCUSSIONS WITH CERTAIN EMPLOYEES RELATING TO THE TRADE UNION, MR. BILL WILSON AND MR. SILVIO PITTARELLI, ACTING ON BEHALF OF THE COMPANY, VIOLATED SECTION 64 OF THE LABOUR RELATIONS ACT.

THE ACT GIVES EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES.

TO FORM, JOIN AND PARTICIPATE IN THE  
LAWFUL ACTIVITIES OF A TRADE UNION.

TO ACT TOGETHER FOR COLLECTIVE  
BARGAINING.

TO REFUSE TO DO THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES WE WILL NOT DO ANYTHING THAT  
INTERFERES WITH THESE RIGHTS.

IN PARTICULAR, WE ASSURE OUR EMPLOYEES THAT WE WILL NOT  
INTERFERE WITH THEIR RIGHT TO JOIN THE RETAIL, COMMERCIAL & INDUSTRIAL  
UNION, LOCAL 206, CHARTERED BY THE UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION, AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

J. PASCAL INC.

PER:

(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.



**0566-85-R International Woodworkers of America, Applicant, v. Lajambe Forest Products Limited, Respondent, v. Group of Employees, Objectors**

**Certification - Practice and Procedure - Employees arriving at work on application date finding time cards removed - Given termination notices - Not punching in or doing any work on application date - Included for purposes of employee count**

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *I. M. Stamp* and *S. O'Flynn*.

**APPEARANCES:** *Bernie Hanson* and *Harold Sachs* for the applicant; *Richard Nixon*, *Frank Lajambe Sr.*, and *Mark Lajambe* for the respondent; no one appearing for the objectors.

**DECISION OF THE BOARD; July 15, 1985**

1. This is an application for certification in which representatives of the applicant and the respondent met with a Board Officer prior to the hearing scheduled in this matter and reached agreement on all matters in dispute between them with the exception of the issue described below with respect to whether or not certain persons listed on Schedule D of the employer's list should be included or excluded for purposes of the count.

2. No one appeared on behalf of the objectors at the hearing of this matter. Therefore, the Board, pursuant to section 73(5) of its Rules of Procedure, will dispose of this application without considering the statement of desire filed by the objectors.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Garden River Indian Reserve, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. As indicated above, the applicant and the respondent were unable to reach agreement on the issue of whether certain individuals on Schedule D of the employer's list should be included or excluded for purposes of the count. They were, however, able to agree that the Board should decide that issue on the basis of the following agreed statement of facts. The employees in question are the first sixteen on Schedule D. A decision was made by the respondent on June 5, 1985 to lay off those sixteen employees. Records of Employment (in the form required by Employment and Immigration Canada for unemployment insurance purposes) were prepared for all of those employees on June 5, 1985. (A sample consisting of one of those Records of Employment was filed with the Board as Exhibit #1.) Those Records of Employment indicated the employees' last day worked to be June 5, 1985, and gave "shortage of work" as the reason for issuing the Record of Employment. Termination notices were also prepared on June 5, 1985. (A sample termination notice was filed with the Board as Exhibit #2.) Those notices also indicated the employees' last day worked to be June 5, 1985, and gave "shortage of work due to market conditions" as the reason for leaving. At the time

those documents were prepared, the respondent had no idea when the applicant was going to file its certification application. The employees involved work on the day shift which begins at 7:30 a.m. Since they had no prior notice before the morning of June 6 that they would not be scheduled for work, they came to the plant on the morning of June 6, 1985. They received their first indication that a layoff was imminent when they checked their time cards in order to punch in and found that the time cards were not there. They were then told to go to the office where they were given their termination notices. None of the employees punched in for work. All of them were given their termination notices prior to 7:30 a.m. The respondent's employees are not paid for travel time to and from the plant, or for expenses incurred in going to and from work. None of the sixteen individuals worked on June 6, 1985, and no wages were paid to them in respect of that day.

6. On the basis of that agreed statement of facts, counsel for the applicant submitted that the Board should find the employees in question to be included for purposes of the count. In support of that position, he referred the Board to *Bond Place Hotel*, [1982] OLRB Rep. Aug. 1135; *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840; and *Holiday Juice Ltd.*, [1984] OLRB Rep. Feb. 277. Counsel for the respondent, on the other hand, submitted that the employees in question should be excluded for purposes of the count. He attempted to distinguish the *Bond Place Hotel* case, but conceded that the present case is indistinguishable from *Amplifone Canada Ltd.*

7. After recessing to consider the submissions of counsel, the Board made the following oral ruling, which is hereby confirmed:

Having considered the able submissions of counsel, we are unanimously of the view that the sixteen employees in question should be included for purposes of the count. As Mr. Nixon candidly conceded in his submissions, the present case is indistinguishable from *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840, in which the Board wrote as follows at paragraph 20:

It is our opinion that the persons who, not having been forewarned by the respondent, presented themselves at their place of work in the reasonable expectation of carrying on their normal employment must be found to be employees in the bargaining unit on the date they so reported and should have been shown on Schedule "A" and not on Schedule "C", notwithstanding the fact that they were laid off indefinitely without performing any work on that same date.

That case has been consistently followed by the Board over the years, most recently in *Holiday Juice Ltd.*, [1984] OLRB Rep. Feb. 277, in which the Board wrote as follows at paragraph 9:

The vast majority of employees either work on the application day or are scheduled in advance not to work that day. But occasionally an employee who is scheduled, when the day of the application arrives to work that day does not actually work [sic]. The Board has held a person who reports to the employer's premises on the application day with an expectation of working and is laid off indefinitely before doing any work is an employee on that date. See *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840 and *Bond Place Hotel*, [1982] OLRB Rep. Aug. 1135. This legal result has been reconciled with the wording of the schedules by interpreting the phrase "actually at work" to refer to attendance at the workplace with an expectation of working.

We see no valid reason to depart from that well-established guideline, which provides a sharply drawn, "bright line" test that generally enables employers to place names on the correct

schedule, and minimizes subsequent disputes as to who was or was not an employee for purposes of the count.

8. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on June 18, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

9. A certificate will issue to the applicant.

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**0777-84-R** L'Association des Enseignantes et Enseignants Suppléants, Applicant, v. Le Conseil Scolaire d'Ottawa, Respondent, v. The Ontario Secondary School Teachers' Federation, Intervener

**Bargaining Unit - Practice and Procedure - Unit sought restricted to occasional teachers in French language secondary schools run by school board - Separate community of interest justifying separate unit for French schools - Teachers on employer's list nominally but not available for work not included in employee count**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *F. W. Murray* and *S. Cooke*.

**APPEARANCES:** *Allan R. O'Brien* and *James M. Hewitt* for the applicant; *Bruce Stewart* for the respondent; *Maurice Green* for the intervener.

**DECISION OF THE BOARD;** July 22, 1985

### Introduction

1. This is an application for certification. It is one of a series of similar applications now before the Board arising out of efforts by "occasional teachers" to form or join a trade union, and engage in collective bargaining. These occasional or "supply" teachers work for various Boards of Education across Ontario. The term occasional teacher is defined in section 1 of the *Education Act*, R.S.O. 1980, c.129, as follows:

Occasional teacher means a teacher employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who was absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year.

In many of these applications the occasionals have indicated a desire to be represented by the intervener.



2. Occasional teachers are called in to work on an as-needed basis, whenever the regular classroom teacher is absent for a temporary period. For example, if a regular history teacher is away for a week with the flu, the school will endeavour to find another history teacher to fill in. Accordingly, it is impossible to predict the precise number or identity of the occasional teachers who will be working for the respondent in any given time period, except in the case of a few so-called "long-term occasionals" who are called upon to replace regular teachers who have died or who are away for a considerable period of time. The work relationships of the occasional teachers will necessarily be casual and erratic. This, in turn, poses certain practical problems for this Board, which we will discuss in more detail below.

3. It is common ground that the labour relations and collective bargaining of occasional teachers is regulated by the *Labour Relations Act*. They are not excluded from the *Labour Relations Act* by section 2(f) because they are not "teachers" as defined in the *School Boards and Teachers Collective Negotiations Act, 1975*, R.S.O. 1980, c.464 ("Bill 100"). The result is something of an anomaly. Occasional teachers fall under the *Labour Relations Act*, while the regular contract teachers whom they replace are covered by Bill 100; and the two statutory schemes are quite different. This Board has jurisdiction over only a residual "fragment" of the "education sector". The Board's established approaches to bargaining unit determination simply do not apply very well to these unique circumstances.

4. The issues in the instant case can be summarized as follows:

1. Is the applicant a "trade union" within the meaning of section 1(1)(p) of the *Labour Relations Act*
2. Is the bargaining unit which the applicant seeks to represent "appropriate" for collective bargaining?
3. If the applied for bargaining unit is appropriate, how does one define its composition - that is, the number and identity of the employees whose wishes are to be canvassed in the certification process?

5. It is the third issue which arises from the sporadic nature of the occasional teachers' employment, since it could well be argued that the persons named on the respondent's "call-in list" should not be considered "employees in the bargaining unit at the time the application is made", unless they are literally *actively at work* on the application date. When not *actively* employed they are simply a list of *prospective* or *potential* employees whom the respondent might choose to engage, from time to time as its needs require. However, the parties have agreed that this third issue is already before the Board and will be resolved in *Board of Education for the City of York* (Board File 0264-84-R). The parties are agreed that the result in the *City of York* case should be applied here. Unfortunately, following the argument in this matter, the parties in *City of York* put in further evidence, then exchanged written submissions, thus adding some delay to the issuance of the Board's decision. The *City of York* decision was finally released on May 6, 1985. (See, [1985] OLRB Rep. May 767.)

[Paragraphs 6 - 13 inclusive omitted: Editor]

## The Bargaining Unit

### I

14. The applicant union seeks a bargaining unit comprising the occasional teachers employed by the respondent in the six French language secondary schools established pursuant to Part XI of the *Education Act* (OSSTF has filed a certification application in respect of the occasional teachers at the other schools). The applicant asserts that the occasional teachers working in the Part XI schools have a distinct community of interest and that, therefore, this subdivision of the respondent's employees constitutes an appropriate bargaining unit for collective bargaining purposes. The applicant's position is supported by the intervener, OSSTF. The respondent asserts that any bargaining unit of occasional teachers should include all such employees whether they regularly work in the six Part XI schools or the other eighteen secondary schools maintained by the Ottawa Board of Education. The respondent maintains that to divide the Part XI schools from the others would create an unwarranted and unreasonable fragmentation of the bargaining structure.

15. It may be useful to refer briefly to certain aspects and outcomes of the collective bargaining scheme established by Bill 100, as well as the purpose of Part XI of the *Education Act*. The organization of occasionals has occurred "in the shadow" of Bill 100, and Part XI provides the statutory basis for the respondent's French language schools. The union submits that some of the themes embodied in Bill 100 may assist the Board in fashioning a bargaining unit under the *Labour Relations Act*, and that the Part XI schools are a distinct, separate and quite unique part of the Ottawa school system.

16. Part XI of the *Education Act* provides for schools and programmes designed to meet the educational and cultural needs of French speaking students and the local French community. The size of the programme depends upon local needs, but is obligatory where numbers warrant. The establishment or extension of these programmes involves a significant degree of consultation with a committee of French speaking rate payers. The committee makes recommendations on a variety of matters from the establishment, operation and management of French language instructional units to the provision of transportation for pupils or the development of adult education programmes (see section 267 of the *Education Act*). Section 275 of the Act establishes a commission known as the "Languages of Instruction Commission of Ontario" composed of five members appointed by the Lieutenant Governor in Council, at least two of whom must be French speaking and at least two of whom must be English speaking. The Commission considers matters referred to it by local committees or the Minister and has certain ancillary responsibilities for the investigation and mediation of local problems. In summary then, the *Education Act* recognizes the unique status and needs of the French language community and provides an elaborate system of consultation so that the education system will be sensitive to, and accommodate, those needs.

17. Under Bill 100, the Francophone Teachers' Association, AEFO, is given statutory recognition as an affiliate teachers' organization representing francophone teachers wherever they are employed. This in itself suggests that the francophone teachers may have a distinct

community of interest. Why else would the statute provide for a separate *statutory* bargaining agent for Francophones? AEFO and OSSTF may choose to bargain jointly and conclude a collective agreement containing similar terms for francophone and non-francophone teachers working for the same board, but Bill 100 carefully preserves the autonomy of the two affiliates. Section 4(1) contemplates joint negotiation; it does not require it. Two branch affiliates may find it convenient to act together jointly as one bargaining party, but it appears that they are entitled to give a separate notice to bargain and conclude a separate collective agreement should they so wish. And if this division along linguistic lines seems unusual, it must be remembered that, in the education sector (historically at least) teacher organizations have also reflected their members' sex or religion (see section 1 of Bill 100, which provides that the Federation of *Women Teachers' Associations of Ontario* and the *Ontario English Catholic Teachers' Association* are "affiliates" with certain collective bargaining rights for their respective members). Religion, language, ethnicity and gender have institutional recognition in the education sector, in ways which are quite foreign to the private sector or other parts of the public sector.

18. The collective agreement covering the respondent's regular teachers results from joint collective bargaining between the respondent the local branch affiliates of OSSTF and AEFO which represent their anglophone and francophone members, respectively. The bargaining committee includes representatives from both branch affiliates. The terms and conditions of employment are virtually identical for all teachers, whatever the language of instruction, however, a teacher's particular and allowances may be a little different, depending upon whether he is a francophone member of AEFO or a non-francophone member of OSSTF. The teacher's placement on the grid depends upon the rating and evaluation system employed by the affiliate of which he is a member, and the OSSTF and AEFO systems are somewhat different.

19. Vacancies are posted throughout the system, but the agreement contemplates two separate seniority lists: one for teachers assigned to teach in the (Part XI) French language secondary schools, and another for teachers assigned in the other schools. There are both practical and contractual limitations on the ability of teachers to transfer from one list to another (see Article 18.10). Positions in the permanent supply pool are also divided along linguistic lines. There are twenty-four such positions of which eight must "be filled from the English Language Seniority List" and six must be filled from the "French Language Seniority List" (see Article 18.13).

20. To this point, we have been discussing the statutory and collective bargaining framework established for contract teachers, and the special status under the *Education Act* of the Part XI schools. James M. Hewitt, is an occasional teacher in the Part XI schools and an officer of the applicant. He explained how the occasional teachers fit into the scheme of things.

21. Mr. Hewitt has thirty-two years of teaching experience, mostly in the Province of Quebec. He spent twelve years as a teacher in Quebec City, four years as an inspector, three years as a high school principal, and thirteen years as the director of English Schools for the City of Quebec. He was represented in Quebec by a unilingual French trade union, and although he is bilingual himself, he told the Board that there were a number of unilingual English teachers working in the same schools who experienced some difficulties dealing with a bargaining agent whose services were provided only in French. According to Mr. Hewitt,



that is one of the reasons why he became concerned when OSSTF began to organize occasional teachers in the secondary panel of the Ottawa Board of Education. In his opinion, OSSTF had never had to develop a capacity to deal with the problems of French speaking members since such individuals would ordinarily be represented by AEFO. Since 1968, anyone teaching in a Part XI school has had to be a member of AEFO. The only exception is a small number of individuals who had previously been members of OSSTF and were permitted to continue that affiliation. There are not many of these teachers and their numbers are declining.

22. In the respondent's six "Part XI schools", French is the language of instruction, communication and administration. French is the language ordinarily used by teachers, students, principals, vice-principals, administrative officials and support staff. The occasional teachers also work in French. The majority of the occasional teachers, ordinarily working in the Part XI schools, are francophone and bilingual, but there are a number of teachers who do not speak English at all.

23. The vast majority of the occasional teachers who would be in the applicant's proposed bargaining unit teach exclusively in the Part XI schools. There are some individuals (like Mr. Hewitt himself) who are qualified to teach in either stream, but, in practice, there is very little interchange. Most of the occasional teachers who ordinarily teach in Part XI schools, will not accept an assignment in the "English school system" even if they are qualified in both.

24. The Ottawa Board of Education has a separate budget for Part XI schools, which have different funding criteria. When dealing with occasional teachers, there are two separate "call-in lists": one setting out individuals qualified in Part XI schools, and another for persons available for assignments in non-Part XI schools. In either case, the method of deployment is the same: the principals and vice-principals do most of the hiring and selection. Only a few persons are initially referred through the respondent's personnel office. There are identical terms and conditions of employment for the "English" and "French" language occasionals.

25. The Ottawa Board of Education has six superintendents. One of them is Guy Lapensee who is the superintendent in charge of Part XI secondary schools. He also oversees some non-Part XI schools, but no other superintendent has responsibility for the French schools. As it happens, Mr. Lapensee's assistant is the recording secretary for the local French advisory committee and Mr. Lapensee himself attends most of the meetings.

26. The principals and vice-principals working for the respondent have an association. The principals and vice-principals of the Part XI schools are members of the association and attend its meetings. However, the principals and vice-principals of the Part XI schools also have their own separate association, and attend its meetings as well.

## II

27. The respondent, quite rightly, raises the spectre of fragmentation of the bargaining structure which can often lead to collective bargaining problems - as the Board noted in *Kidd Creek Mines Limited*, [1984] OLRB Rep. March 481:

50. We may begin by observing that the notion of an "appropriate" bargaining unit

is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purposes of collective bargaining, and section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered. Yet the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand, there are dangers at the other extreme, as the Board noted in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

A patchwork quilt of bargaining units is a recipe for industrial unrest - if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unraveling.

51. The point is, that the concept of the appropriate bargaining unit is an instrument of public policy, and in fashioning bargaining units under section 6(1), the Board endeavours to accommodate potentially competing collective bargaining values - including the right to self-organization and the desirability of industrial harmony. Both are objectives which the statute seeks to promote...

28. While broader-based bargaining units can sometimes contribute to collective bargaining stability and fragmentation can sometimes lead to collective bargaining problems, the Board has not adopted and, in our view, should be reluctant to adopt any rigid, *a priori* assumptions about what is appropriate - at least in the absence of a well established body of collective bargaining practice in similar circumstances. Section 1(1)(b) of the Act clearly contemplates that the bargaining unit can consist of a "sub-division" of the employer's enterprise. The Board's task in any particular case is to determine whether the unit applied for is, in all the circumstances, "appropriate". (See generally *Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430; *Ponderosa Steakhouse (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7; *Canada Trust Co. Mortgage Company*, [1977] OLRB

Rep. June 330; *K-Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250; *Kidd Creek Mines*, *supra*; and, more recently, *The Hospital for the Sick Children*, [1985] OLRB Rep. Feb. 266.) In particular circumstances, the Board has found a single-branch plant to be appropriate, an office or production employee unit to be appropriate, a full-time or part-time employee unit to be appropriate, a "craft" employee unit to be appropriate, or even (although rarely these days) an appropriate unit consisting of a single "department" in the employer's enterprise. The determination of the "appropriate bargaining unit" is essentially a policy-laden decision, based upon (but not limited to) an assessment of such considerations as: whether the employees have a community of interest, having regard to the nature of the work performed, the conditions of employment, their skills, and the employer's administrative structures; geographic circumstances; the employees' functional coherence, interdependence or interchange with other employees of the employer; the right of employees to a measure of self-determination; any likely adverse effects to the collective bargaining process that might flow from the proposed bargaining unit or from the fragmentation of employees into several units, and so on. Simply put, the question is whether the proposed bargaining unit encompasses a sufficiently coherent subdivision of the respondent's employees to permit viable collective bargaining. The employer's concerns are entitled to consideration, but the unit which best suits the employer's interests, objectives, or administrative convenience will not necessarily be the appropriate unit - not least because in some cases one of the employer's objectives may well be to avoid collective bargaining altogether or limit its effectiveness. It is a question of balance.

29. The difficulty faced by the Board in this case is that there are very few analogies or precedents to which the Board can look for guidance. Collective bargaining for teachers is primarily regulated under Bill 100, which does not even have a process of certification or bargaining unit determination. In those educational institutions subject to the Board's jurisdiction (private schools and universities) there is no precise equivalent to the occasional teacher, and, in any event, the Board would not normally fashion a bargaining unit composed entirely of casual employees. Individual schools may be a little bit like individual retail stores or branch plants of a larger parent organization, which have usually been held to be separate bargaining units, however, the comparison is far from perfect. We repeat that the Board's jurisdiction only extends to a few of the teachers working in each school, and their numbers and identity will vary constantly.

30. Occasional teachers fall under the *Labour Relations Act* almost by default and as the Board observed in the *City of York* case, it would be much simpler if all qualified teachers employed to teach were covered by the same general legislation governing teachers' collective bargaining. But that is not the case. The occasional teachers, although qualified, are not included in the bargaining system which covers their professional peers. They come within this Board's jurisdiction and the Board must therefore determine how it should weigh its usual approaches and criteria for bargaining unit determination in light of both the history and framework for bargaining established under Bill 100 and the particular circumstances of this case.

31. We have considered the evidence and representations in this matter together with the particular characteristics and context of collective bargaining in what might be described as the "education sector". The Board is satisfied that the group of employees whom the applicant seeks to represent do indeed share a distinct and definable community of interest and that they can appropriately be grouped together in a bargaining unit reflecting those interests. However, lest there be any misunderstanding as to the basis for reaching this conclusion, we



wish to make it clear that community of interest exists quite apart from the identity of the applicant union. The fact that a particular union (or unions) may have the capacity to service the needs of a group of workers in one language or another may explain why employees might choose to join that union, but it does not mean that the Board is or would be influenced in its determination of the appropriate bargaining unit, by the identity of the applicant. For collective bargaining purposes the respondent's six Part XI schools are a distinct subdivision of the respondent's organization, and the occasional teachers working in that subdivision comprise an appropriate bargaining unit. This case goes no further than that.

32. Having regard to the foregoing and having carefully weighed the evidence and representations of the parties, the Board finds that the unit of employees appropriate for collective bargaining in this case should be framed as follows:

All occasional teachers employed by the respondent in its secondary schools where French is the language of instruction (Part XI schools) in the City of Ottawa, save and except persons covered by subsisting collective agreements.

#### The Composition of the Bargaining Unit and Related Problems

33. Because the appropriate bargaining unit is composed entirely of casual employees with an uncertain and quite varied attachment to the employer, there is a final question as to how the Board should determine who should be counted as an "employee in the bargaining unit" at the time the application is made. Similarly, if it is necessary to direct the taking of a representation vote, who should be entitled to vote? These questions were canvassed at some length in the *City of York* case (see paragraphs 49-55), and it is unnecessary to repeat that analysis here. The parties were agreed that they would abide by the *City of York* decision on this point. It suffices to say that there is nothing in the circumstances of this case or the submissions of the parties which suggests that we should take any other approach.

34. We would only add that there may well be persons on the respondent's list of occasional teachers who at the time of the application were no longer available for work even though nominally on the employer's list. This could occur for a number of reasons - for example, if the occasional teacher had secured a permanent job elsewhere but had failed to notify the school board, or moved to another city. We make this observation because in a number of occasional teacher cases it has been necessary not only to reconsider the employee list filed by the employer in light of the principles and approaches set out in the *City of York* case, but also to purge the list (or a voters' list) of teachers who were *nominally* available in accordance with the employer's records, but in fact were not actually available because they had left the area or secured permanent work elsewhere, but had failed to notify the employer.

35. It appears to the Board that, in this case, it may well be necessary to rectify the list of employees filed by the employer in light of these difficulties and the decision in *City of York*, before the Board can make a final determination of the number of employees in the bargaining unit, the number of union members, and whether there is the requisite degree of membership support to warrant taking a representation vote. To that end, a Board Officer is hereby appointed to inquire into the employee list and the composition of the bargaining unit. Because of the passage of time and the need to verify the accuracy of the employee list, it may be necessary for the respondent to file with the Board and make available to the applicant

such information as may be available respecting the employees' current addresses and home phone numbers. Clearly it would be undesirable to include in the employee group those who should not be there, or to exclude those who have a provable interest. While a certification application is necessarily framed as a proceeding between a union and employer, it is the wishes of the employees which are determinative, and it would be unfortunate if employees with the requisite interest were mistakenly excluded from the decision-making process.

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**1104-83-U Gerald Lecuyer, Cash Podlewski and John Polhill, Complainants, v. Canadian Paperworkers Union, Local 132 and Canadian Paperworkers Union, Respondents, v. Abitibi-Price Inc., Intervener**

**Duty of Fair Representation - Intimidation and Coercion - Remedies - Unfair Labour Practice - Whether conduct of union meeting and speech by official intimidation - Refusal to pursue grievance involving critical job interest not *per se* unlawful - Union violating duty by withholding information at membership meeting - Will of majority of membership no defence in circumstances - Decision not to pursue grievances motivated by official's ill-will towards complainants - Board reviewing its remedial powers in unfair representation cases - Refusing legal costs and costs of proceedings - Inviting submissions on appropriate remedy - Whether referral to arbitration or decision on merits appropriate**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *J. A. Ronson* and *L. C. Collins*.

**APPEARANCES:** *F.J.W. Bickford, J.D. Polhill, G.A. Lecuyer* and *C.W. Podlewski* for the complainants; *W. Dubinsky, Marvin Pupeza* and *Ronald Balina* for the respondent; *R. Andrew Shields, Richard Dixon* and *Orest W. Halushak* for the intervener.

**DECISION OF OWEN V. GRAY, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON; July 23, 1985**

1. The three complainants are skilled tradesmen employed by Abitibi-Price Inc. ("Abitibi") in the mechanical department of its Mission Mill ("the Mill") at Thunder Bay. At all times material to this proceeding, the terms and conditions of their employment and that of other Mill employees were governed by a collective agreement between Abitibi and "the Canadian Paperworkers Union, CLC and it's [sic] Local 132" (referred to here, as in the collective agreement, as "the Union") with effect from May 1, 1982 to April 30, 1984. Beginning in July, 1982, there were several occasions on which employees were selected for short-term layoff from their regular jobs on the basis of their length of service at the Mill ("mill seniority"). The complainants and others in the mechanical department felt such layoffs violated the terms of the collective agreement, which in their view required that selection of employees for layoff from their regular jobs be based on length of service in the department concerned ("departmental seniority"). The complainants attempted to grieve the effects and potential effects on them of the company's reliance on mill seniority in effecting layoffs in July, 1982 and thereafter. The union, however, refused to accept or present some of their grievances; the others of those grievances were not taken beyond the first step in the grievance procedure, where they were denied by the employer. The complainants say that the Union's treatment of them and their grievances violated sections 68 and 70 of the *Labour Relations Act*, which provide:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease



to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

2. John Polhill has been employed as a journeyman pipefitter in the mechanical department of Abitibi's Mission Mill ("the Mill") since January, 1962. He served as Vice-President of Local 132 in 1975, and was a shop steward for a period of two or three years prior to that. He is currently an Alderman of the City of Thunder Bay.

3. Cash Podlewski has been employed as a journeyman millwright in the mechanical department of the Mill since February, 1973. He served two terms as shop steward prior to 1980, when he acted as Vice-President of Local 132 for eight months after the incumbent resigned.

4. Gerald Lecuyer is also a journeyman millwright. He has been so employed in the Mill's mechanical department since March, 1976.

5. Local 132 represents approximately 200 production and maintenance workers. About thirty-five of these work in the mechanical department; the rest are employed in the several other production departments referred to in the collective agreement. The By-laws of Local 132 provide for the election of its officers: a President, Vice-President, and Recording and Corresponding Secretary, 3 other officers and 3 trustees. Officers other than trustees are elected every two years. Article 9, section 1 of those By-laws provides for a grievance committee:

Section (1)(a) The grievance committee for this local shall comprise of the President, Recording Secretary, Chief Shop Steward, and the shop stewards of the various departments.

(b) The Vice-President of this local shall act as Chief Shop Steward.

(c) Any grievance by a member shall be dealt with in the following manner:

Submitted to the shop steward in writing.

Submitted to the chief shop steward and department head.

To the grievance committee and management.

(d) Any member approaching management with a grievance, and acting as an individual shall be censored.

6. Ron Balina has been President of Local 132 since January, 1977. He is a production worker in the finishing and shipping department of the Mill, and has been employed at the Mill for approximately twenty-four years now. From the evidence we heard, it is apparent that Mr. Balina is an active, aggressive leader. Executive board decisions are effectively his decisions. The same can be said of his role on the grievance committee and as leader of the union's delegation at labour-management meetings, which are held regularly during the term of the collective agreement.

7. The millwrights and pipefitters in the mechanical department repair and maintain, and occasionally construct additions to, the Mill's equipment and mechanical systems. In the fall of 1982 there were approximately eight journeymen pipefitters and twenty journeymen millwrights in the mechanical department. Some, like the grievors, had been journeymen tradesmen when they began work at the Mill. Others became journeymen after becoming

employed at the Mill, either by serving a four-year apprenticeship program under Abitibi's Trades Apprentice Plan, or by establishing proficiency in the trade to the satisfaction of the company's evaluation committee under the Tradesman Promotion Plan after serving a minimum of seven years as a helper in that trade and completing a correspondence course equivalent to that taken by apprentices. Both of these plans have formed part of the collective agreements between Abitibi and the Union for many years. Article 34.03 of the current collective agreement provides:

34.03 When a man transfers from some other job to the status of an apprentice in one of the mechanical trades, he shall maintain his seniority in the job from which he is transferred for a period of six (6) months. Following such probationary period, his seniority shall develop exclusively within the mechanical group to which he transferred. If, when the period of apprenticeship (four (4) years) is served there is a vacancy for a journeyman in the trade for which the apprentice is qualified, he will be retained and will be granted two (2) years' seniority as a journeyman and will become eligible for promotion in accordance with the Tradesmen Promotion Plan.

The language of Article 34.03 appears again in paragraph 11 of the Trades Apprentice Plan, which is Appendix 'I' to the collective agreement.

8. Article 7 of the collective agreement reads:

#### 7.PROMOTIONS AND LAY-OFFS

7.01 When vacancies occur in a department then the Company shall post on bulletin boards throughout the mill a notice concerning the bottom job in the department affected. Such notice shall indicate the qualifications essential to promotion within that department. Such posting shall be for a period of ten (10) working days and the Company shall have the right to make temporary appointment without penalty. **In all cases of promotion the Company will give consideration to seniority, ability and qualifications. When the last two factors are relatively equal, seniority will govern.**

7.02 In cases of promotions, where the man to be promoted is not the senior man in the department concerned, the Company will present the alternative name to the Union, who will have the opportunity to discuss with the Company the qualifications of the senior man. The Company shall take such presentation into consideration in making its decision which decision may be subject to the grievance procedure outlined in Article 30 of this Agreement.

7.03 The Company will train employees to minimize the hiring of skilled men from outside the mill.

7.04 When laying off help Union men shall be retained in preference to those not members, among equally efficient employees, the older in point of service being given preference of employment (the same principles to govern as in the case of promotions).

7.05 In cases of lay-offs, plant wide seniority with due regard to jurisdiction of each of the signatory unions shall apply. In making transfers under this rule it is understood and agreed that in moving between departments, the senior man must have the necessary qualifications to enter the department and shall have access only to the bottom job in the line of progression in the department to which he is being transferred. If the number of senior employees involved in a permanent lay-off exceeds the number of junior employees holding bottom jobs in the lines of progression, the Company, if requested by the Union, will locate other job openings in jobs held by junior employees above the bottom jobs so as to assure continued employment for senior employees. Training will be given if necessary to the senior employees.

7.06 When employees are laid off they shall be recalled in reverse order of their lay-off.

Substantially similar provisions have formed part of Abitibi's collective agreements with the Union and its predecessor, Local 132 of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, for nearly thirty years. Some language has remained unchanged despite its becoming outdated. The reference in Article 7.05 to "each of the signatory unions", for example, make less sense now than it did in the 1950's and 1960's, when agreements between Abitibi and this Union's predecessor were also executed by four other (craft) unions. It is common ground that the past practice of the parties to it is an important consideration in the interpretation of this collective agreement.

9. The layoffs which trouble the complainants resulted from production shut-downs of varying durations. Prior to 1982, production shut-downs had generally not resulted in layoffs of journeymen in the mechanical department, as maintenance work ordinarily continued unabated during a production shut-down. The production shut-downs in and after July 1982, were different; they were more frequent, maintenance work was also reduced and journeymen tradesmen were laid off. When Abitibi followed mill seniority rather than departmental seniority in selecting journeymen for layoff, some tradesmen found themselves without work while men they had originally trained as apprentices or helpers remained at work.

10. Having regard to their understanding of past practice and to the language of Article 7, Article 34.03 and paragraph 11 of the Trades Apprentice Plan, the complainants believe the collective agreement provides that promotion to and layoff from any particular job are both governed by departmental seniority. Article 7.02 governs promotions, and the complainants say that the words "senior man in the department concerned" in that Article refer to the man with the most departmental seniority. The complainants emphasize the words in brackets at the end of Article 7.04, which deals with layoffs. They say those words mean that the seniority which governs the initial selection for layoff is the same seniority which governs promotion: departmental seniority. As a result, they say that selection of persons for layoff from their own departments is to be made on the basis of departmental seniority. They read Article 7.05 as giving effect to mill seniority only in the exercise of bumping rights - the right of an employee targeted for layoff from a job in one department to transfer into a job for which he is qualified in another department, a right the transferring employee can exercise only if he is senior to the employee performing the target job. Thus, in the complainants' view, if a layoff requires a reduction in the number of journeymen millwrights, it would be the millwrights with the least departmental seniority who would lose millwrights' work during the layoff period. Those redundant millwrights could then exercise their mill seniority to bump into any jobs remaining in other departments for which they are qualified.

11. John Polhill says his belief in this interpretation is reinforced by certain events which occurred in 1969. At that time Abitibi planned to lay off a journeymen pipefitter. The choice was between Polhill and Victor Wazinski, who had three weeks' more mill seniority than Polhill. Unlike Polhill, who had been a journeyman when he began working at the mill, Wazinski had begun work at the mill as a second year apprentice and did not qualify as a journeyman until three years after he was hired. At the time of the proposed 1969 layoff, Polhill was told that he would be retained in preference to Wazinski. Polhill recalls that this advice came in the form of a letter from a Mr. Neeley, a company official, who quoted the language of what is now Article 34.03 and explained that Wazinski's departmental seniority



was less than that of Polhill because at the end of his first three years of employment he had been credited with only two years' seniority pursuant to that Article. Wazinski received notice of layoff. As it happens, that layoff was cancelled before it occurred. This was the only example any of the witnesses offered of a layoff of journeymen effected or announced prior to July, 1982, in which the choice between mill or departmental seniority as the basis for selection would have affected the identity of the person or persons selected for layoff.

12. The events which led to this complaint began in June of 1982. Near the end of that month, Abitibi posted a seniority list in which mechanical departmental employees were listed in the order of their mill seniority. Although there were rumors of impending work force reductions, none had been announced when this list was posted. However, Polhill and Lecuyer anticipated, correctly, that the company might be planning to use this list to determine the order of the rumoured layoffs. They obtained grievance forms from a shop steward and each prepared a grievance protesting the seniority list, referring to Articles 7 and 34 of the collective agreement and paragraph 11 of the Trade Apprenticeship Plan. They gave these grievances to a shop steward who, they understand, gave them to Dick Facca, the Vice-President and Chief Shop Steward of the local union. Some time after the grievances were submitted, Facca came and advised each of them that the President had ruled these grievances "out of order". Polhill and Lecuyer received no further explanation at the time. Balina testified that he decided not to present the grievances because it would have been inappropriate to do so before any layoffs had been announced. During his cross-examination of the union's Recording Secretary, Bill Shanks, whose testimony followed Balina's, counsel for the complainants demanded and obtained production of minutes of union-management meetings attended by Balina, Facca and Shanks. These revealed that Abitibi's business difficulties and the increasing probability of layoffs and work reductions had been a regular topic of discussion in the meetings prior to the posting of the mill seniority list in June, 1982. At the union-management meeting of June 23, 1982, Balina specifically asked whether mill seniority would be applied in determining the order of impending layoffs. Abitibi said it would. It is clear to us, and would have been clear to Abitibi at that meeting, that that was the answer Balina was seeking when he raised the issue.

13. The first layoff affecting journeymen was announced in July, 1982. Cash Podlewski was one of those told he would be laid off commencing July 25, 1982. On July 21, 1982, Podlewski prepared a grievance which reads as follows:

#### Nature of Grievance

Junior Millwrights are working for the week of July 25/82 or more while senior millwrights are laid off. This is a case where Class "A" millwright teaches the apprentice or helper all the aspects [sic] of the trade and then he (the apprentice or helper) takes the senior millwrights job. Appendix I trade Apprenticeship page 105 (Article 11) *seniority* states very clearly how much seniority the man has when he finishes his apprenticeship.

#### Settlement Desired

Senior Trade (Class A) Millwrights to be reinstated to work for the week of July 25/82 and proper permanent [sic] mechanical journeymen seniority list to be put on the Board.

Podlewski gave this grievance to Al Giles, a journeyman pipefitter who was then a shop steward in the mechanical department. Giles testified that he gave the grievance to Balina, who subsequently gave it back to Giles and told him it was not accepted. Giles returned with his

grievance form and told Podlewski that the President had not accepted it because a similar grievance dealing with the same subject matter had already been filed by Blake Landversitch (a millwright whose seniority, both departmental and mill, was less than Podlewski's).

14. Podlewski spoke to the Chief Shop Steward, Dick Facca, about his grievance on at least two occasions. The first was shortly after it was rejected. He then took it to Facca and asked him if he would process it. Facca said he would not, and said the Landversitch grievance would deal with the issue. At some time in October, 1982 Podlewski again asked Facca if he could do something about processing his grievance. Podlewski says Facca told him that he was sympathetic, but could not do anything because Brother Balina had ruled the grievance "out of order". Facca added that the decision was made "it's mill seniority", and that he (Facca) could not overstep him (Balina). Facca was not called as a witness. The complainants' testimony about conversations with him was uncontradicted.

15. The Landversitch grievance was presented at the first step of the grievance procedure in July, 1982, and was denied by Mr. Halushak, the Mill's Superintendent of Industrial Relations. The grievance then proceeded to Step 2, which involved a meeting at which the company would be represented by Mr. R. A. Shields, Abitibi's Toronto-based Manager of Industrial Relations, and the Union would be represented by Marvin Pupeza, a full-time paid representative of the Canadian Paperworkers Union in its Thunder Bay office. Such a meeting was scheduled for the beginning of October, 1982, to deal with a number of second step grievances. Just prior to that meeting, Balina asked Al Giles whether he wished to attend. Balina did not suggest that Giles would have any particular role at the meeting. Giles understood he would be an observer. He accepted the invitation.

16. When the Landversitch grievance was reached at the October meeting, Mr. Pupeza "presented" it. Balina then expressed his opinion about the meaning of the collective agreement. Giles understood Balina to be speaking against the grievance. Balina claims he spoke for the union, not against the grievance. It is clear, however, that Balina believes mill seniority should govern every aspect of a layoff and he also believes that this is the unequivocal, long-standing policy of his union. The basis of that belief will be explored later. We are satisfied that he spoke for an interpretation unfavourable to the Landversitch grievance. Balina then said that perhaps Mr. Giles would like to say a few words, as he was more directly affected by the issue raised by the Landversitch grievance. Giles testified that he felt both surprised and honoured when he was asked to speak. He spoke for about ten minutes in support of the grievance, reciting the pertinent articles of the collective agreement and his understanding of how they had been and should be applied. The meeting then went on to deal with other grievances, and ended with Mr. Shields indicating he would let the union know the company's answer in due course.

17. On October 7, 1982, there was a meeting in Thunder Bay of representatives of the locals of the Canadian Paperworkers Union that represent employees at various Abitibi operations. They were getting together with Don Holder, a senior officer of the national union, to discuss issues of common concern. Although not expressly invited to the meeting, Podlewski attended because he wanted to ask Holder about how the union's grievance procedure was supposed to work, and especially who had the power to turn down a grievance. He also wanted to ask about the national union's interpretation of the seniority clause. Podlewski approached Holder after the meeting was over, and asked who had the right to turn down a grievance. He says Holder told him that only "the floor" (members at a membership

meeting) could turn down a grievance, not the executive or the grievance committee. If a grievance was not supported by the grievance committee, the member was supposed to be notified so that he could make argument on his own behalf when the floor considered the grievance. Podlewski then brought up the question of seniority, at which point Holder called Balina over to join the discussion. Holder then invited Podlewski to say what he had to say. Podlewski gave his argument with respect to departmental versus mill seniority. According to Balina, Holder said there was no such thing as "super seniority" for tradesmen, and that "mill seniority governs." Balina says Podlewski then "turned on his heel and stormed out." Holder did not testify. We do not know what he meant by "mill seniority governs" what he based his opinion on, or where he got the idea that anyone was claiming "super seniority".

18. Local 132 holds regular membership meetings in each month except July and August. The complainants made attempts to raise the seniority issue and the union's approach to it at various of the membership meetings in the fall of 1982 and spring of 1983. All of the witnesses had different recollections as to precisely what took place at which meetings. Although minutes of those meetings were kept, they were not intended to and do not reflect everything that occurred at those meetings, and so were often of little assistance resolving conflicts in the recollections of the witnesses.

19. At the October or November membership meeting, Gerald Lecuyer attempted to raise the seniority question and to ask about the grievance he had attempted to file in June. He says the President ruled him "out of order". The President says Lecuyer was told to sit down by the other members present at the meeting. The President approved of "the floor" having done that because, he says, Lecuyer did not put up his hand and ask permission to speak before speaking. Lecuyer remembers that at this meeting Victor Wazinski and Mr. Nieckars both tried to support the complainants view on the seniority issue. Wazinski spoke about the events of 1969, and said the approach used then could not be changed without a resolution of the membership. Nieckars, who was a past president of the local, spoke to the same effect. Lecuyer says Balina ruled Wazinski and Nieckars "out of order".

20. At either the October or November membership meeting, Cash Podlewski asked why his grievance of July 21, 1982, had not been dealt with. In response, the President said that the Landversitch grievance was identical to Podlewski's and he felt he should only submit one. He then told the meeting he had selected the Landversitch grievance because Podlewski's grievance was illegible, his spelling was atrocious, and he would have been "ashamed" to process it. These remarks were coupled with an observation about Podlewski's Polish heritage, which apparently amused other members and embarrassed Podlewski. We have both the Landversitch grievance and the Podlewski before us in evidence. Podlewski's grievance is handprinted in capital letters, and contains two spelling mistakes. It is entirely legible. The Landversitch grievance is handwritten rather than printed, and is considerably less legible than the Podlewski grievance. The number of spelling errors in the Landversitch grievance might be debated, as the total turns on how one deciphers some of the handwriting in it. On any objective view, however, there clearly are more spelling errors in the Landversitch grievance than in the Podlewski grievance. When Balina was faced in cross-examination with the spelling errors in the Landversitch grievance, he simply refused to acknowledge that they were there.

21. Abitibi's answer to the Landversitch grievance came in the form of a letter from Andrew Shields dated October 27, 1982. The letter was addressed to Marvin Pupeza and copied to Balina. That answer is central to an understanding of this complaint, and is therefore reproduced in full:



This grievance concerns the manner in which departmental and mill seniority are to be applied in the case of layoffs. During recent mill shutdowns, the tradesmen with the most mill seniority were provided with employment while those with more departmental seniority, but less mill seniority, were laid off. During our meeting the President of Local 132, Mr. Balina, indicated that he agreed with the Company's procedure and Mr. Giles argued that it should be changed.

Having re-considered the arguments of Mr. Giles, I am now convinced that he is technically correct. Traditionally when applying the terms of Article 7 in other departments which are the subject of layoffs, those employees with the least *departmental* seniority are bumped out of the department first. Only once an employee has been "bumped" out of his department does he exercise his *mill* seniority to gain access to bottom jobs in other departments in the mill.

Notwithstanding the above, however, since Mr. Balina indicated agreement with the Company's procedure and since he has taken the position that it should continue in the future, the Company will not amend this practice unless Mr. Balina, on behalf of Local 132, indicates a desire to handle future situations on a departmental seniority basis.

Balina received this letter before the Local's November membership meeting. There was no report on or discussion of the Landversitch grievance at that meeting. The agenda for the meeting included receiving nominations for executive positions; the election of officers was to take place at the December meeting. Balina was nominated for the office of President. Mr. Balina says he did not report on the company's answer to the Landversitch grievance because he wanted to discuss the company's answer with officers of the national union, and planned to do so when he attended at the parent union's convention in Montreal. That convention was scheduled for mid-December, after the December membership meeting. Balina did not explain in a satisfactory manner why he would not have planned to complete his consultations, and particularly the consultation with Mr. Pupeza, in time to present the company's answer at the December membership meeting.

22. Balina admits that at some point in the fall of 1982 he instructed shop stewards not to give the complainants any grievance forms for seniority grievances "until the new year". He could not explain to us the significance of the new year in this context.

23. Balina was re-elected President of the local at the December membership meeting. Balina and Facca attended the CPU convention in Montreal during the week of December 13, 1982. They met one afternoon with Marvin Pupeza and Chris Monk. Monk is a paid representative of the parent union. He operates out of an office in Winnipeg and at times shares with Pupeza coverage of the area served by the Thunder Bay office. Balina and Monk both testified that the Landversitch grievance and the question of mill versus departmental seniority were discussed at this meeting. In the course of the discussion, Pupeza told Monk that he understood that mill seniority had been applied in past layoffs at Mission Mill. Monk said he understood that "mill seniority governs" under all CPU contracts. He was shown the letter from Shields to Pupeza. He testified that he understood it to support his view that, on the language of the collective agreement, "mill seniority governs."

24. At some time after the union received the company's answer to the Landversitch grievance, Mr. Halushak, the mill's Superintendent of Industrial Relations, asked Giles whether he had seen that answer. When Giles said he had not, Halushak showed him a copy of Shields' letter of October 27, 1982. Giles told the complainants that the company had

described their interpretation of the collective agreement as "technically correct". They did not know how else an interpretation could be correct. They looked forward to a "floor" discussion based on a reading of the letter. They were disappointed when the letter was not read either at the November meeting or at the December meeting. The complainants then sought legal advice. There was no report on the Landversitch grievance at the membership meetings in January or February of 1982. The complainants' lawyer, Mr. Bickford, wrote the following letter dated March 14, 1983, addressed to the trade union to the attention of Balina:

We have been approached by a number of members of Local 132 regarding the Local's refusal to process a number of individual grievances protesting layoffs where senior tradesmen have been laid off from the Mechanical Department while junior tradesmen have continued to work.

From our reading of the Collective Agreement between Abitibi-Price Inc. and Local 132, it is clear that these layoffs constitute a violation of Clause 34.03 found on page 31 of the 1982 - 1984 Agreement and also a violation of Section 11 of Appendix "T" found on pages 104 and 105 of the same Agreement.

Because of the Union's failure to process these grievances, the Union is in violation of its duty to fairly represent all employees in the bargaining unit found in Section 68 of the Labour Relations Act and the affected employees now have a right to file a complaint with the Ontario Labour Relations Board and to ask that they be compensated by Local 132 for the wages they have lost as a result of the layoffs in question.

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*[Settlement proposal not reproduced]*

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May we please hear from you prior to 4:00 p.m. on March 18th, 1983.

Finally, on behalf of our clients, this letter will also serve as notice to the Company that it is the intention of our clients, if they are laid off contrary to the Collective Agreement, to file grievances asking that they be reimbursed for all lost wages and benefits incurred by them as a result of their layoff in addition to pursuing any rights they may have against the Union pursuant to the Labour Relations Act.

Balina contacted the union's lawyer, Mr. Dubinsky, and wrote to Mr. Bickford to advise him that his letter of March 14th had been referred to Mr. Dubinsky for reply.

25. The seniority issue was not dealt with at the local unions membership meeting on the evening of March 14th.

26. On March 17, 1983, the Mill manager called Balina to his office. Their conversation became the subject of an exchange of correspondence. The Mill manager's letter of March 18, 1983, reads:

The Company recently received a copy of a letter sent to you by Mr. F. J. W. Bickford of Weiler, Maloney, Nelson concerning a dispute as to the proper application of seniority in the case of mechanical department layoffs.

You will recall that when this matter was discussed during the fall of 1982, you agreed with the Company's procedure in this regard and took the position that the subject procedure should

continue unchanged into the future. Following those discussions, Mr. Shields, in his grievance answer dated October 27, 1982 (copies to you), found merit in the alternative arguments advanced by certain tradesmen but went on to say:

“Notwithstanding the above, however, since Mr. Balina indicated agreement with the Company’s procedure and since he has taken the position that it should continue in the future, the Company will not amend this practice unless Mr. Balina, on behalf of Local 132, indicates a desire to handle future situations on a departmental seniority basis.”

The Company’s position remains as outlined above and to date, we have not had any indication from you that you desire any change in the subject procedure. Since you again confirmed with me, yesterday afternoon, your agreement with the Company’s approach to the scheduling of mechanical employees for the upcoming shutdown, these schedules will remain unchanged. However, the Company relies on this agreement with you, as President of C.P.U. Local 132, to indemnify and save the Company harmless against any claim for lost wages or benefits by those tradesmen who do not agree with this scheduling/layoff approach.

Mr. Balina’s reply was on Canadian Paperworkers Union Local 132 letterhead, and was also dated March 18, 1983. It read:

Dear Sir:

Re: Your Letter of March 18, 1983  
Mechanical Department Layoffs

We wish to acknowledge receipt of the above-referenced letter. We do not agree to indemnify and save the Company harmless against any claim for lost wages or benefits by those tradesmen who do not agree with the current scheduling/layoff approach as outlined in the last paragraph of your letter.

Also with respect to the discussion between myself and you as mentioned in the last paragraph - it was just that, a discussion between the Mill Manager and employee. Since it was not a scheduled meeting, my comments to you were given as an employee and not as an official representative of Local 132. Should you wish to discuss the matter formally, a meeting would have to be formally called.

27. On March 18, 1983, Polhill and Lecuyer filed grievances with respect to the March 21st layoff referred to in Mr. Bickford’s letter. In those grievances they again took the position that the proposed order of layoff was contrary to the seniority provisions of the collective agreement. On March 21, 1983, Mr. Halushak endorsed on each of those grievances the following first step answer:

This matter was fully considered during the second stage grievance procedure re: grievance No. 21, 1982 (132) on October 17th, 1982 which was resolved with your Union. This grievance is denied. There is no violation of agreement. Please see attached answer to grievance No. 21.

A copy of the October 27, 1982, letter from Shields to Pupeza was attached to the grievance forms returned to the union. Polhill and Lecuyer were told the company had denied their grievances on the same basis as the Landversitch grievance.

28. Mr. Bickford had this letter delivered to Balina on April 11, 1983:

I acknowledge and thank you for your letter of March 18, 1983 advising that Mr.



Dubinsky was representing Local 132 in this matter and that he would be in touch with me in due course. This is to advise that Mr. Dubinsky has not contacted me.

I further understand that several grievances have been filed regarding the layoffs that occurred the week of March 21st and that the Company has denied these grievances. I further understand that these grievances are to be considered at a regular meeting of Local 132 on the evening of April 11, 1983.

This letter will serve to put Local 132 on notice that it is the desire of the grievors to have these grievances referred to arbitration.

I would also request that you advise me in writing of the decision reached at tonight's meeting and the reasons for the decision. Furthermore, I would like this information no later than April 14, 1983.

29. The union's next monthly membership meeting took place on the evening of April 11, 1983. Podlewski and Lecuyer were both in attendance. Balina read out Mr. Bickford's letter of March 14, 1983. He then read what he said was a letter from Don Holder, the Vice-President of the National Union, in which, Balina said, Holder asked for the names and clock numbers of the members referred to in Mr. Bickford's letter. Balina said he wanted those members to stand up and acknowledge that letter. Polhill was not at the meeting. Podlewski and Lecuyer were, but they did not stand up and identify themselves. They had heard rumors that some members, and particularly Podlewski, were going to get their "cards pulled", which they took as a threat to their employment. In that context, the reference to card numbers in Balina's invitation to speak up greatly concerned Podlewski and Lecuyer. There was some discussion about seniority at this meeting. Podlewski recalls that Victor Wazinski attempted to describe the layoff plans of 1969, and Mr. Nieckars attempted to explain what had happened in the past. Both of them were ruled out of order or told what they were saying was not relevant.

30. After the membership meeting of April 11, 1983, Balina decided to call a lunch-hour meeting of members of the mechanical department. This decision was prompted by a discussion with one of the journeymen employed in that department. Balina read a speech he had written out by hand. Despite the absence of "[sic]", the following *is* an accurate transcript of Balina's handwritten draft; only the emphasis has been added:

Over the many years as elected Chairman and President of our local union, we have come across many difficult and sensitive tasks in which we had to deal with for the benefit of the best possible representation that could be afforded for all our members. In the recent past and at present there has occurred a most definite reason to believe of *an undermining of the executive and maybe mainly myself as president of our local union by a minority group of members in this mechanical department*. I called this gathering today because I have been approached by a couple of very concerned members of this minority group to help resolve the bitterness brought about by some members in this department for personal gain rather than what is fair and just and written for all members of this local.

This situation, that seems to bother this minority group deals with plant wide seniority versus department seniority. This local union's official position is the same that has been adopted 50 years ago as part of our Collective Agreement which we do not have any authority to change or alter, but at the negotiations, if the local union desires. The position of this situation is backed by the National Vice-President as stated to a member face to face with three executive members of the local union present. *The company's response on this situation is no violation of the collective agreement and one we very seldom agree to, but, we cannot fool ourselves or our members to lead them down the garden path and therefore,*

*we must concur with the company's answer.* Our labour lawyer, as well, whom we consult with on many grievances also agrees.

The bitterness brought about by this minority group without any local union authority, between fine members of this local is totally uncalled for and should cease immediately. Some members calling down others is not a thing we should be doing at times like these. It is too bad this economic situation is upon us at this time but we are not alone. Local unions across the nation are having difficulties to adjust too. Does this mean because we do not get our way that, we break up our families. These times should be used to bring us closer together not farther apart. This statement is one to you members on behalf of the local union executive, this matter has been explored fully and we have exhausted all avenues, however, we deem this matter complete and closed. This matter has warranted far too much attention and perhaps should be treated as an anonymous letter is, - Ignored! Since no one has yet had the courage, but a couple of respected minority members of their convictions and have not admitted their personal involvement in this matter. *We also must say if this minority group without any authority persist, then we must duly inform you that caution be given to every aspect and to be prepared to suffer all circumstances that may result.* We refuse to jeopardize the rights of the majority for the personal gains of the minority.

(emphasis added)

31. None of the three complainants was in attendance at the meeting of the mechanical department on April 14, 1983. They had all learned of an anonymous telephone call received by Mrs. Lecuyer on April 12th. The caller had told Mrs. Lecuyer that she would be collecting her husband's life insurance if he did not stop his endeavours "against the union". The complainants all thought it prudent not to attend a meeting at which they correctly suspected those endeavours would be discussed. They heard afterwards that Balina had made a speech in which he stated that the union had made its decision that mill seniority would apply and that anyone who continued trying to change that decision would suffer the consequences or they were "on thin ice." Podlewski approached Dick Facca and asked if he could get him copies of the documents read out at the membership meeting of April 11th and the departmental meeting of April 14th. Facca told Podlewski that he could not.

32. On April 22, 1983, Mr. Dubinsky wrote this letter to Mr. Bickford:

Your correspondence directed to Local 132 in connection with the above matter has been given to us for reply. We wish to advise that pursuant to the procedures provided in the by-laws resolutions and constitution of the union the matter was thoroughly examined by the grievance committee. The grievance committee had an opportunity of reviewing the evidence that had been presented to it, examining the collective agreement and examined the response from the employer. As a result the grievance committee concluded that there was no breach of the collective agreement. At a recent meeting of the membership of the local, a full report was submitted. The meeting concurred with the decision of the grievance committee.

At the same meeting those persons who were the alleged grievors were invited to speak out to make any representations that they desired. Although they appeared to be present, they chose not to present any representations on their behalf to the grievance committee or to the general membership. As a result the local has determined not to proceed with the grievances.

There is no evidence that Mr. Dubinsky was at any of the meetings referred to in his letter, nor is there any evidence of the means by which Mr. Dubinsky acquired the information he set out in his letter. We can only suppose that Balina told him that the facts were as he set them out in his letter.

33. Balina's testimony was most revealing. On the subject of the grievance procedure,

he acknowledged that the employer's answer to grievances submitted by the union normally came to him; however, he did not consider it his job to "track down" the shop stewards who had submitted such grievances in order to tell them what the company's answer was. So far as he was concerned, shop stewards have to come to him to find out how the grievances they submitted had been answered. With respect to the complainant Podlewski, he acknowledged there had been an occasion prior to the events in question when, in the course of a membership meeting, he had thrown the gavel "to" Podlewski. He spoke derisively of Podlewski's attempts to obtain a copy of the speech he had read to the mechanical department meeting on April 14, 1983. Podlewski "tried to get a copy by asking everyone but me," he testified in chief. This prompted counsel for the union to ask whether he would have supplied a copy if Podlewski had asked him directly. Balina answered "certainly not!" When asked to explain the reference in his speech of April 14th to an "underming" (undermining) of the executive by a minority group, Balina said "at the nomination meeting they were trying to get someone to run against me."

34. We have already recited the basis on which Balina claims he chose to process the Landversitch grievance rather than that of Mr. Podlewski. He chose to process only one, he said, because he felt that a decision on one would resolve the others. He said the Landversitch grievance had been processed in the same way as other grievances. Indeed, he said the union had "over extended" itself in processing the Landversitch grievance, and explained that remark by observing that they had allowed Mr. Giles to be present and make representations at the second stage meeting and had also "allowed" Podlewski to express his views to Mr. Holder. He could not remember what Pupeza said about the Landversitch grievance when he presented it at the second stage meeting with Mr. Shields. He could not even remember whether Pupeza spoke for or against the grievance. Although he denied speaking against the grievance himself, he could not remember what he had said about it at that meeting. When it was put to him that someone must have made it clear to the company at that meeting that the local union did not support the grievance, Balina replied that he could not remember that "information" being given to the company.

35. Balina could not recall Mr. Wazinski speaking out at membership meetings about the past practice evidenced by the 1969 planned layoff. Even though he had heard reference to that planned layoff during the testimony of Mr. Polhill in November, 1983, when he testified in continued hearings in February, 1984, Balina admitted he had never looked into what had taken place with respect to Wazinski and Polhill in 1969.

36. There is no evidence that any of the grievances referred to in this decision, including the Landversitch grievance, was considered at any formal meeting of a grievance committee constituted in the manner contemplated by the local's by-laws. Balina claimed he discussed the results of the Landversitch grievance in an informal way with the "head table executive". He could not say when he had done that, however, and said he did not know the views of Messrs. Facca and Shanks, two members of the "head table executive", on the question whether mill seniority should apply in determining who is to be laid off. Balina was not sure whether Mr. Shields' letter of October 27, 1982, had ever been read out at any membership meeting, and we find that it had not. It is crystal clear that neither the Mill manager's letter of March 18, 1983, nor Mr. Balina's reply of the same date were ever read out at any membership meeting. Mr. Shanks, the union's Recording Secretary, testified that correspondence received by the local is given to him, and it is the local's practice that such correspondence is read out at the next membership meeting. Shanks said that he had never



seen the two letters exchanged between Balina and the Mill manager on March 18, 1983, and had never seen Mr. Shields' letter of October 27, 1982 either. This latter statement stands in curious contrast to Mr. Balina's testimony that Shanks had accompanied him to a meeting with Mr. Dubinsky at which the matters dealt with in Shields' letter were discussed.

37. Balina acknowledged it had always been his view that mill seniority governed in the case of layoffs. He said this had been the policy of the Canadian Paperworkers Union for fifty years. It was not clear how he would know that, or where this union policy is to be found. Balina claimed that past practice favoured his interpretation of the collective agreement. In that connection, as we have noted, he had not made any investigation to determine what practice had been followed in the 1969 layoffs referred to in Mr. Polhill's evidence and, we find, by Mr. Wazinski at membership meetings. When the hearing of this complaint adjourned in February, 1984, we invited Mr. Balina to offer some examples of the past practice to which he had referred in evidence. When the hearings resumed four months later, Mr. Balina offered several examples of layoffs in which employees had remained at work as a result of the exercise of mill seniority. However, as he acknowledged in cross-examination, every one of the examples he offered involved a worker first being displaced from his own job on the basis of his *departmental* seniority, then exercising his *mill* seniority to bump into a job in another department. He acknowledged that in each example mill seniority had only come into play after the worker concerned had been displaced from his own department. Still, Mr. Balina insisted that past practice supported the procedure adopted by the company in the series of layoffs which began in July, 1982, when mill seniority, and not seniority within the department, had been the basis for selection of workers to be displaced from their own department. Balina was evasive when asked whether he had taken Article 34.03 and paragraph 11 of the Trade Apprentice Plan into account in forming his own opinion about the meaning of the collective agreement. Balina acknowledged that the seniority referred to in those provisions of the collective agreement must be departmental seniority and not mill seniority. He acknowledged also that departmental seniority had significance in the case of promotions.

38. Balina repeatedly claimed that Mr. Shields' letter of October 27, 1982, supported his interpretation of the collective agreement. He refused to acknowledge that the second paragraph of that letter supported the claimant's views on the interpretation of the collective agreement and on the nature of the parties' past practice with respect to application of that collective agreement. He refused to acknowledge that the word "procedure" as used in the third paragraph of Shields' letter referred only to the procedure adopted in the July, 1982, layoff which was the subject of the Landversitch grievance. He insisted that he interpreted that third paragraph as agreeing with his view that the procedure adopted in that particular layoff was in accordance with past practice. Balina persisted in those assertions even in the face of the Mill manager's letter of March 18, 1983.

39. This complaint was filed on August 23, 1983. A summary of the relevant facts would not be complete, however, without reference to an event which occurred in September, 1983. After meeting with a Labour Relations Officer, the union agreed to let the complainants file grievances with respect to a layoff which occurred in that month. When Lecuyer gave his grievance to the shop steward, he asked whether there was any truth to the rumor that Balina had told the company not to give minutes of union-management meetings to anyone other than the Union's Recording Secretary. The shop steward said that he did not know anything about that, and left for the area where Mr. Balina was working. Balina came up to Lecuyer some time later. He grabbed Lecuyer's shirt collar, and part of the skin of his neck, with his fist.

He said he did not want Lecuyer to use his (Balina's) name without his permission. He invited Lecuyer to step outside "to settle this once and for all." Lecuyer then told Balina he apologized if Balina had taken his question to the shop steward the wrong way, and explained that he had not been referring to him as an individual but as President of the local union. This seemed to calm Balina down. He accepted the apology and returned to his own department. Balina acknowledges the incident, but says it had nothing to do with the subject matter of these complaints.

### Argument

40. Counsel for the complainants argues that the complainants' interpretation of the relevant collective agreement is the correct one. He says the collective agreement gives the complainants rights which they are entitled to have enforced, and that the failure to enforce them is, *per se*, a violation of section 68 of the *Labour Relations Act*, however fair the union's decision-making procedures may have been. Even if the failure to pursue those grievances to arbitration is not alone a violation of section 68, counsel argues that in the circumstances surrounding the union's decision not to pursue those grievances, that decision does violate section 68. He argues that the union cannot have been as certain of its interpretation of the collective agreement as Balina would have us believe he was, if at the union-management meeting in June, 1982, it occurred to the union representatives to ask the company whether mill seniority would be applied in effecting upcoming layoffs. He asks us to find that the union must have been in doubt of that point, and argues that this makes its subsequent conduct incomprehensible. He asks us to find that the union did not give serious consideration to the issues raised by the complainants' grievances and that of Landversitch. He asked us to find that the decision not to proceed with these grievances was made by Balina, that Balina made that decision even before the second stage meeting on the Landversitch grievance and that he steadfastly refused thereafter to consider any factor inconsistent with his own interpretation of the collective agreement and the result he wanted to achieve. He argues that the decision to treat the Landversitch grievance dispositive of the complainants' grievances failed to take into account that each was an individual grievance in which the relevant positions on any seniority list, and the ensuing result to any grievor, might well be different. He argues that that decision constituted a violation of the duty created by section 68. In any event, having treated the Landversitch grievance as potentially dispositive of the complainants' concerns, he argues, the union's handling of that grievance breached the section 68 duty in relation to these complainants.

41. With respect to the allegation that the union's actions violated section 70, counsel said that by the actions of Balina at the membership meeting of April 11th and the meeting of the mechanical department on April 14th, the respondent local union sought by intimidation to compel the complainants to refrain from exercising their right under the *Labour Relations Act* to pursue their grievances in this complaint.

42. The complainants ask that the respondents be ordered to process their grievances to arbitration and to compensate them for all monies they have lost as a result of being laid off contrary to the provisions of the collective agreement and for the legal costs they have incurred as a result of the respondents' violations of the Act. The complainants also ask that the Board award putative damages and direct the respondents to post a notice to employees in the usual form acknowledging their violations and confirming that they will cease and desist from continuing violations of the *Labour Relations Act*.

43. Counsel for the respondent argues that there is no evidence of intimidation of the complainants by the union. He observes there is no connection established between the union and the anonymous threats to Mrs. Lecuyer and that the physical handling of Lecuyer by Balina after the complaint was filed was unconnected with issues relating either to the complaint or to any potential arbitration.

44. With respect to the complaint that the union's conduct violated section 68, counsel asked the Board to find that the union did direct its mind to the relevant considerations. He asks us to find that Mr. Shields' letter of October 27, 1982, supports the union's position. He submits that the fact that Balina was elected president shows that he was not an unreasonable or sinister man, arguing that most people can discern such characteristics and that the members of this union would not have elected Balina if they had discerned such characteristics in him. He argues that any member of the union can make a motion at a membership meeting to have a grievance proceed to arbitration. He said the complainants could have done that, and failed to do so only because they realized the motion would not have succeeded. Because no such motion had been made, the union could not be guilty of refusing to pursue the matter.

45. Counsel for the union observed that the collective agreement contains no time limits for the filing of grievances, and argues from that that it was entirely reasonable for Balina to select one "seniority" grievance to process as a test case, and that this approach did not in any way prejudice the grievors' position. With respect to the standard required by section 68 in union action and decision-making, he cited *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519, *The Steel Company of Canada Limited*, [1974] OLRB Rep. June 392, *Antonio Melillo*, [1976] OLRB Rep. Oct. 613, *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791 and *Catherine Syme*, [1983] OLRB Rep. May 775. He argued that the settlement or consolidation of grievances was not a *per se* violation of section 68; *Catherine Syme*, *supra*, and *Stelco Inc.*, [1983] OLRB Rep. May 771. With respect to the claim for putative damages and costs, counsel argued that the Board is without jurisdiction to award the former and has consistently refused to award the latter, citing *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303 and *The Corporation of the City of Thunder Bay*, [1984] OLRB Rep. May 759, at paragraph 28.

46. Abitibi-Price Inc. was granted intervener status, and its representatives were present throughout the Board's hearing of this complaint. Its representatives did not lead any evidence or cross-examine any witnesses. They did reserve the right to make representations at the conclusion of the case, having regard to the claim that the respondent trade union be directed to take the complainants' grievances to arbitration. The representations made on Abitibi's behalf were brief and simple. Its representative suggested that the company's position with respect to the application of seniority was very clear from the letters introduced in evidence. Because Abitibi had not taken sides in the argument over which form of seniority should be applied, Abitibi's representative suggested that no liability should be imposed on Abitibi with respect to the layoffs. With respect to remedy, Abitibi's representatives said the Board would have to tell Abitibi which side to take if it decided that the union should proceed to arbitration on the mill versus departmental seniority issue.



### Complaint of Intimidation and Coercion

47. The complainants have not established that the respondent local union violated section 70 of the *Labour Relations Act*. The kind of behaviour to which that section is directed was discussed in *The Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781, where the Board observed at paragraph 59 that:

59. Section 70 of the Act prohibits any interference with the rights of individuals under the Act amounting to compulsion by means of intimidation or coercion. Without exhaustively defining the meaning of those terms it appears to the Board that at a minimum they must relate to conduct which, directly or indirectly, deprives an individual of his free choice in the exercise of his rights under the Act. While that might include acts or threats which are physical or economic, the section is aimed at preventing interference with an individual's rights by some form of pressure or force that removes their ability to choose. (*Tim Reay*, [1982] OLRB Rep. Aug. 1206; *Beatrice Foods (Ontario) Ltd.*, [1982] OLRB Rep. Apr. 519; *Purple Heart Film Corp.*, [1979] OLRB Rep. Sept. 900; *Great Lakes Forest Products*, [1979] OLRB Rep. July 651; *Intermodal Marine Surveys Ltd.*, [1979] OLRB Rep. April 321; *Innovative Wood Products*, [1978] OLRB Rep. 161; *Alex Henry and Son Ltd.*, [1977] OLRB Rep. May 288; *A. Greco*, [1976] OLRB Rep. June 323; *Andrew Warren*, [1976] OLRB Rep. Jan. 963; *Canadian Textile and Chemical Union*, [1971] OLRB Rep. Aug. 469.

(See also *Keith Macleod Sutherland*, [1983] OLRB Rep. July 1219.) The behaviour of the local union complained of here was not calculated to deprive nor capable of depriving the complainants of their ability to choose.

48. Before explaining our assessment of behaviour which was clearly that of the local union, we make two observations about behaviour which was not. The first is that there is no evidence from which we can conclude that the union is responsible for the threats on Mr. Lecuyer's life which were conveyed to Mrs. Lecuyer by telephone in April, 1983. The second observation is that when Balina assaulted Lecuyer in September, 1983, he was not acting in the course of his duties or the exercise of his powers as President of the local union. Accordingly, the union could not be legally responsible for that action, and as Balina is not a named respondent, it is unnecessary to decide whether the assault constituted an unfair labour practice.

49. The complainants say the local union violated section 70 at the April 11th membership meeting when Balina demanded that the members referred to in Mr. Bickford's letter identify themselves by clock number as well as by name. They say their concern about the reference to clock numbers was heightened by a rumour that the complainants might have their "cards pulled." They did not identify the source of this rumour, and there was no evidence that Balina or anyone acting on the local union's behalf had started or was even aware of this rumour nor, for that matter, that the complainants thought he had or was. It cannot be supposed, therefore, that Balina intended his request for clock numbers to take on the special connotation the complainants say they attached to it as a result of their having heard that rumour. We see nothing wrong with the request that the members concerned identify themselves. When a trade union receives a demand from a lawyer that his client's grievance be taken to arbitration, the trade union needs to know who the client is before it can deal with the demand. The complainants' lawyer having twice made such a demand without expressly identifying his client or clients, there was nothing sinister about the trade union attempting to find out whose demand it really was. The request for clock number lends a certain formality to the request for a name, but it does not seem out of place in this context.

We note that when members sign the attendance sheets at the beginning of a membership meeting, most of them identify themselves by name and clock number.

50. The complainants say that Balina's April 14th speech to employees in the Mechanical Department, and particular the second last sentence of that speech, violated section 70. We do not agree. It is not clear what, if anything, is being threatened by the words "all circumstances that may result" in the sentence in question. The thrust of Balina's speech was that the debate over seniority was divisive, and that it would be better for the local to be united. In that immediate context, these words could be taken as referring to the consequences which the minority and the rest of the membership could expect would naturally follow if the minority were to persist; it is not entirely clear these words would or should be taken as threatening that the minority would be made to suffer some otherwise unanticipated circumstances. Even if Balina's words are taken to imply retaliation rather than mere causation, the threatened "all circumstances that may result" are left entirely undefined by the speech or its context. Although Balina's behaviour prior to the speech gives us concern when we consider the respondents' duty under section 68, we can find nothing in his or any other local union conduct which would have lent that vague phrase some special meaning capable of effecting intimidation or coercion. The threat, if there was one, was not clear enough or serious enough to come within the ambit of section 70, even if Balina's reference to the minority's persisting would or should be taken as referring to their exercising rights under the *Labour Relations Act*.

51. Insofar as it alleges a breach of section 70, this complaint is dismissed.

#### Complaint of Breach of Section 68

52. The balance of the complaint is based on the alleged violation of section 68 of the Act by the complainants' bargaining agent, "the Canadian Paperworkers Union, C.L.C., and its Local 132" as the bargaining agent is named and recognized in the applicable collective agreement. It is well established that section 68 does not give an employee with a grievance any absolute right to have his collective bargaining agent take the grievance to arbitration. In its capacity as collective bargaining agent, a trade union is bound to represent all of the employees in a bargaining unit. In deciding whether to champion the particular interests of one or more of those employees, whether in the negotiation of a collective agreement or in dealing with grievances arising under a collective agreement, the union must assess the effect its so doing will have on the others it represents. In determining whether and how far to pursue a grievance, the trade union must consider not only its importance to the grievor, but also the likelihood of success and the impact success or failure will have on the union and other employees it represents. If the grievance raises a question of interpretation of a collective agreement provision, the union is entitled to consider whether an interpretation favourable to the grievor is consistent with past practice and also whether its obtaining or even advocating such an interpretation would have an adverse impact on the rights and expectations of other employees. A balancing of other legitimate interests against those of the grievor may warrant the trade union's compromising a grievance which might have succeeded at arbitration: *Rayonier Canada (B.C.) Ltd.*, [1975] 2 Can LRB 196 at pp.203-204; *Antonio Mellilo*, [1976] OLRB Rep. Oct. 613 at paragraphs 14 to 16; *Algoma Steel*, [1981] OLRB Rep. June 611 at paragraph 6; *Catherine Syme*, [1983] OLRB Rep. May 775 at paragraphs 20 to 22. Indeed, there can be circumstances in which such competing considerations may justify a trade union

abandoning a claim with which the employer is prepared to agree: *Massey-Ferguson Industries Limited*, [1980] OLRB Rep. Jan. 49.

53. While not challenging the general proposition that an employee has no right to have every sort of grievance taken to arbitration, counsel for the complainants argued that an employee must have such a right when the grievance involves a “critical job interest.” On this theory, a trade union is always obliged to pursue a claim on an employee’s behalf if his or her continued employment or job security is at stake, and there can be no countervailing consideration or other excuse for its doing otherwise. That is not a theory which has been accepted by this Board: see *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35 at paragraphs 18 and 19. Trade union action that leaves unchallenged, or even results in, the loss of employment or job security of one or more of the employees it represents is not *per se* unlawful. However, where critical job interests have been adversely affected by a trade union’s actions as bargaining agent, the Board will subject the union’s action and its explanation for that action to the closest scrutiny.

54. In *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, the Board described the union’s duty under section 68 in this way:

35. In this context, an employee in a bargaining unit for which a trade union exercises exclusive bargaining rights has no reason to expect that his personal interests will always be fully served by the trade union. He does, however, have a legitimate expectation that choices made by the trade union, whether ultimately favourable or adverse to his personal interest, will at least be honest, fair and rationally responsive to interests and circumstances relevant to the decision. It is this employee interest to which section 68 is addressed.

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee’s bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. “Bad faith” and “discriminatory”, therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. “Arbitrary”, on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of a single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at his decision. His ability to recall and articulate what took place in his mind may be influenced, sub-consciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With these thinking process hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated.

...

In *Antonio Melillo*, *supra*, the Board explained the relevance of the merits of a grievance to a complaint that failure to take that grievance to arbitration constituted a violation of section 68:



17. Since the incorporation of the fair representation doctrine into the Ontario Act, the Board has accumulated a considerable body of experience defining the kinds of situations in which it is permissible for a union to deny a grievor access to the arbitration process. Although the judgement in each case turns primarily on its own peculiar facts, the Board has evolved a couple of general guidelines by which the conduct of the trade union may be assessed. The first of these relates to the use which the Board will make of evidence regarding the merits of the grievance itself. In determining whether section 60 has been violated by the trade union, the Board has stated that it does not assume the posture of an arbitration board and adjudicate the merits of the complainant's grievance against the employer. While the Board does not receive and consider evidence of all the circumstances surrounding the grievance, it does so for the limited purpose of determining whether the union has acted in an arbitrary, discriminatory, or bad faith manner in the representation of the complainant (see *Essex International of Canada Limited*, (1972) OLRB M.R. 104). The policy behind this approach is not difficult to fathom. On the one hand, the fact that a grievance appears meritorious may lend credence to an employee's claim that he has been unfairly represented. For example, it may permit the Board to draw an inference of bad faith and/or discrimination in situations where the circumstantial evidence in respect of the union's motivation might otherwise prove inconclusive. On the other hand, the fact that a grievance does not appear to have merit will generally be supportive of the trade union's defence to an unfair representation complaint. (For a recent application of this principle, see the *Jay Sussman* case [1976] OLRB Rep. July 349). That is not to say, however, that the Board will never find a breach in circumstances where the complainant's grievance appears to lack merit (in this regard, see the *Joseph Papp* case (1974) OLRB M.R. 60). Nor is it to say that a meritorious grievance will necessarily be dispositive of the union's defence. The merits of the complainant's grievance is but one of a number of factors (albeit an important one) of which the Board may take account in arriving at the judgment about whether the union has dealt with his grievance in a proper manner. Among the other factors which the Board may consider are: the importance of the particular grievance to the employee concerned, the implications of a settlement or arbitration on the other members of the bargaining unit both now and in the future, whether there is any independent evidence of bad faith or discrimination, the degree of consideration given the grievance by the union, and the experience and qualifications of the trade union officials who have been involved in the processing of the grievance.

The process by which a trade union decides on a course of action is often more critical than the "correctness" of the decision, as the Board observed in *The Corporation of the City of Thunder Bay*, *supra*:

65. The duty of fair representation has both substantive and procedural dimensions. In some cases a union's actions may result in an outcome that is itself arbitrary, discriminatory or in bad faith, even though the procedures by which it creates that result are to all appearances fair and open. The most obvious example of a substantive violation of the duty would be a union voting by a majority of its members to restrict membership or certain rights under a collective agreement to a particular racial group. The fact that it has not been arbitrary or discriminatory in its procedures, and has arrived at its decision by an accepted democratic process involving proper notice, debate and balloting is no answer to a charge that it has nevertheless violated the duty of non-discrimination owed to the minority. That kind of insidious distinction, which for ease of reference may be characterized as substantive discrimination, has been contrary to the duty of fair representation since its earliest judicial expression. (*Steele v. Louisville & N.R.R.*, (1944) 323 U.S. 192)

66. Procedural infringements on the duty of fair representation have more frequently been the basis of complaints under section 68 before this Board (see, generally, Brown, "The Duty of Fair Representation in Ontario" (1982) 60 Canadian Bar Review 412.) The procedural aspect of the duty requires that decisions adversely affecting the interest of an individual or group of employees be made by a process within the unit that is untainted by ill will, hostility or any other aspect of discrimination, arbitrariness or bad faith. Outcomes which are the fruit of such procedures have consistently been found to be in violation of the duty of fair

representation and have given rise to a number of remedial orders under section 89 of the Act. (*Leonard Murphy*, [1977] OLRB Rep. Mar. 146; *Great Lakes Forest Product, Ltd.*, [1979] OLRB Rep. July 651; *Toronto East General and Orthopaedic Hospital Inc.*, [1980] OLRB Rep. Apr. 555; *Toronto Hydro Electric System*, [1980] OLRB Rep. Oct. 1561)

55. Some years ago, Professor Cox observed that:

A large part of the daily grist of union business is resolving differences among employees poorly camouflaged as disputes with the employer.

(Cox, “*Rights Under a Labour Agreement*”, (1956), 69 Harv. L. Rev. 601 at 627.) That is certainly true in this case. When the events giving rise to this complaint began, there were (at least) two views among employees on the part “mill” and “departmental” seniority were to play under the collective agreement in determining who would and who would not remain at work in the mechanical department during a production shutdown. Each side understood that the union could not change the collective agreement except through collective bargaining, which by union custom would require membership approval of any proposed amendment before the union could present the proposal to the employer. The critical question, as both sides perceived it, was the correct interpretation or application of the existing provisions of the collective agreement in light of past practice. The language of the collective agreement was not a model of clarity; each side of the issue felt it could find support for its viewpoint in the provisions of the agreement and in the past practice of the union and employer in applying those provisions to the circumstances of other layoffs. The complainants held one view; Ron Balina, the President of the local, held another.

56. Balina was as entitled to his personal view as the complainants were to theirs. As President of the local union, however, Balina had a major role to play in determining which view the union would support. With that role went the responsibility to ensure that the union did not act in an arbitrary, discriminatory or bad faith manner in making that determination. He failed in that responsibility as a result of his single-minded determination to have his own position succeed (a characteristic which, in other circumstances, may have contributed to his success as a political leader). His failure constituted a violation by the union of its duty to the complainants under section 68 of the *Labour Relations Act*.

57. Balina’s personal animosity toward the complainants was palpable. His ill will toward Podlewski was evident in the explanation he gave for his decision not to process Podlewski’s grievance of July 21, 1983. We can accept, for the sake of argument, that there was nothing improper about a decision to process just one grievance as a test case, and we can even accept that comparative spelling accuracy and neatness would be as good a basis as any on which to select a test case from among otherwise identical grievances. However, Balina’s claim that the handwriting and spelling in Podlewski’s grievance were illegible and atrocious, either in comparison with Landversitch’s grievance or in any absolute sense, is preposterous. The fact that the claim was made at all can only be explained if one remembers that it was first made by Balina at a membership meeting to members who had no way of knowing that it was unfair and untrue. The only purpose Balina could have had in making such a statement at that time was to discredit Podlewski’s position on the seniority issue by discrediting Podlewski personally. That Balina would repeat the claim before us and expect us to believe it was his reason for refusing to present Podlewski’s grievance simply shows how much Balina’s ill will toward the complainants and desire to vindicate his personal views about the collective agreement have clouded his judgement in this matter.

58. Balina's ill will toward the complainants and his inability to recognize a distinction between his own interests and those of the union were both clearly illustrated by his explanation that it was the complainants' attempts in November, 1982, to get someone to run against him for the office of President of the local that warranted his accusing them, in his speech to the mechanical department on April 14, 1983, of undermining the local union's executive. It is as impossible for us, as it must be for the complainants, to imagine that the decisions Balina made in connection with the complainants' grievances were untainted by his ill will toward them.

59. Quite part from the bad faith element introduced by his ill will, Balina's actions were arbitrary in that in making his decisions he persistently failed to take into consideration any matter which supported the complainants' interpretation of the collective agreement. Although he claimed to recognize the importance of past practice in interpreting the collective agreement, he made no effort to investigate the 1969 proposed layoff when it was drawn to his attention. He also failed to take into account or investigate the statement in Mr. Shields' letter that layoffs had traditionally been effected in the manner contended for by Giles and the complainants. This failure to investigate is particularly troubling in view of Balina's inability to provide us with a single example of a layoff effected prior to July, 1982, otherwise than in the manner contended for by the complainants and described in the second paragraph of Mr. Shields' letter of October 27, 1983.

60. In the circumstances, it is no answer for the union to say that Balina had obtained supportive opinions from national officials of the union and from Mr. Dubinsky. The only one of those persons to testify was Mr. Monk. He acknowledged that the application of the seniority provisions on layoffs was a question on which local practice was important. He did not know the local practice. He based his opinion on Pupeza's statement that layoffs at this mill had been conducted in the past in the manner complained of by Landversitch. Pupeza did not testify. We can only infer that his testimony would not have assisted the respondent. It seems likely that Balina was the sole source of any information about past practice on which anyone relied in providing Balina with a reassuring opinion. There is no magic to the fact that one of the opinions Balina obtained was that of a lawyer. The factual foundation on which it is based is just as critical to the value of a lawyer's opinion as it is in any other case. We do not know what Mr. Dubinsky was told or, except as reported by Balina, what opinion he gave. If what he said about the facts in his letter to Mr. Bickford of April 22nd is any indication, his understanding of the facts was not a particularly strong foundation on which to rest any useful opinion. The important point is that Balina controlled the factual basis on which these opinions were given. A decision which arbitrarily ignores relevant information is no less objectionable merely because someone from whom that information was withheld would have made the same decision.

61. The union's principal defence is that there has been no decision *not* to take the Landversitch grievance or any other of the seniority grievances to arbitration. It argues that the complainants could have made a motion at a membership meeting to have one or all of the grievances taken to arbitration. We are asked to conclude from the complainants' failure to do so that they feared the motion would be lost if made. That may be so, but it does not answer this complaint. The fact that union action is approved or dictated by the result or anticipated result of a membership vote will not in every case ensure compliance with the duty imposed by section 68. The reason for that must be obvious. One of the functions of section



68 is to protect minority interests from tyranny of the majority. That very purpose would be defeated if by voting in favour of doing so the majority could cause the union to act with impunity in a manner which is arbitrary, discriminatory or in bad faith: see *Douglas Aircraft Company of Canada Ltd.*, [1976] OLRB Rep. Dec. 779 at paragraph 14.

62. Compliance with the duty of fair representation created by section 68 requires that heads be used and not merely counted. The group vote must satisfy the same test as any other form of decision-making: neither the substance of the decision nor the procedure taken to arrive at it may be arbitrary, discriminatory or in bad faith. (See *The Corporation of the Town of Oakville*, [1984] OLRB Rep. May 731 for an example of a membership vote found to violate section 68.) As with any other kind of decision, a decision taken by vote at a meeting of members can be no more reliable than the information on which it is based. Balina withheld from the membership the fact that Abitibi thought the complainants' interpretation of the collective agreement was "technically correct". He withheld from the membership the fact that Abitibi's understanding of the practice followed prior to July 1982 supported the complainants' position. Of course, Balina claims not to read Shields' letter of October 27, 1983, as saying either of those things. It is significant, however, that he withheld from the members the text of this letter which he says supported his view. That happened despite the local union's practice of having the Recording Secretary read out correspondence at membership meetings; the letter was not given to the Recording Secretary. We can only suppose Balina suppressed the letter because he recognized that if the members knew its contents, they might interpret it differently, as the complainants did and as we have.

63. It is particularly telling that Balina also withheld from the members and the Recording Secretary both the contents and the existence of the Mill manager's letter of March 18, 1983, which made it clear that its following mill seniority in effecting layoffs after July 1982 had nothing to do with what the company thought was the "correct" interpretation or application of the collective agreement, but simply reflected its willingness to adopt whatever procedure Balina told it the union wanted. When he spoke to the members of the mechanical department on April 14th, he told them that the company's answer to the seniority grievance had been that it had not violated the collective agreement by effecting layoffs by mill seniority. The implication was that the union was not likely to succeed at arbitration if it contested that answer. Shanks recalled Balina saying something similar at a membership meeting. Without seeing the letters, the members could not know that Abitibi was continuing the mill seniority approach taken in the July, 1982, layoffs because Balina had told them that was what the union wanted. It would have been obvious from the letters that the company would change its approach if the union asked it to.

64. Balina withheld from the membership information it would have needed in order to properly assess what should be done with the Landversitch grievance. In doing so he acted in a manner which was both arbitrary and in bad faith. While honest errors of judgment, particularly in the balancing of competing interests, may not be proscribed by section 68, wilful or reckless deception clearly is: *Diamond Z Association*, [1975] OLRB Rep. Oct. 791; *Cliff Wilson*, [1980] OLRB Rep. July 1102; *City of Thunder Bay*, *supra*.

65. The respondents are legally responsible for the actions of Mr. Balina and for the consequences of those actions. We find that through and as a result of his acts and omissions, the respondents acted in a manner which was arbitrary and in bad faith in representing the complainants, and in so doing violated section 68 of the Act.

### Remedy

66. The Board's object in exercising its remedial jurisdiction under subsection 89(4) of the Act is to put the complainants in the same position, so far as it is able to do so, as if there had been no breach of the Act. The nature of the appropriate remedy or remedies will vary from case to case, but there is no room in the Board's repertoire of remedies for a remedy whose primary function is to punish: see *Radio Shack*, [1979] OLRB Rep. Dec. 1220 at paragraph 94 and following. By their nature, that is the function of punitive damages. We will not award punitive damages.

67. In addition to compensation for earnings and other benefits lost as a result of the manner in which layoffs have been conducted since July, 1982, a matter which would be dealt with at arbitration if we were to order that the complainants' grievances be taken to arbitration, the complainants ask that we direct that the respondents reimburse them for their costs of pursuing this complaint before the Board, including legal costs and earnings lost as a result of attending the Board's hearings. In *Radio Shack*, *supra*, the Board had this to say about a similar claim for legal costs:

The Board is hesitant to pursue this line of compensation because of the possibility that the denial of legal costs to those parties who successfully defend against complaints may be misunderstood and perceived as unfair. This policy may be reviewed by the Board from time to time.

We consider that policy applicable, and see no reason to review it in the circumstances of this case. The reason for the policy applies with equal force to the claim for any earnings the complainants may have foregone in order to attend at the hearing of this complaint. The complainants' remedy will not include any compensation for their legal or other costs of proceedings to date.

68. The complainants request that the respondents be ordered to process their grievances to arbitration. This is a quite conventional remedy where the alleged breach of section 68 involved a trade union's refusal to process a grievance. We are in doubt whether that is the appropriate response in this case, however, for reasons which require a review of the reasons why referral to arbitration is the conventional remedy.

69. The duty imposed by section 68 has been part of the *Labour Relations Act* since early 1971. At first, the Board regarded a monetary award against the union as its primary, if not only, remedial response to breach of that duty. When the breach involved a failure to process a grievance through the grievance and arbitration procedures, the Board recognized that the amount of a remedial monetary award would have to reflect the likelihood of its success had the grievance been processed properly by the union. This led initially to a two-stage hearing process in cases of that kind. The Board first considered whether the trade union had violated its duty to the complainant and, if it found it had, then assessed the merits of the grievance the union had failed to process: *Rutherford's Dairy Limited*, [1972] OLRB Rep. March 240. As consideration of the merits of a grievance could not be divorced entirely from assessment of the propriety of trade union conduct in processing that grievance, in *Alfred Compton*, [1972] OLRB Rep. Oct. 916, the Board expressed a preference that it hear evidence on both issues together in one hearing.

70. Until late 1973, the employer against whom a trade union had improperly failed to process a grievance was not considered a proper party to the complaint for any purpose. In *Ford Motor Co. of Canada Ltd.*, [1973] OLRB Rep. Oct. 519 (the *Gebbie and Longmoore* case), the Board observed for the first time that, while section 60 imposed no direct duty on an employer, the Board did have the power to award remedies which affected the employer's rights and held that an employer could be made a party to a fair representation complaint for that reason and purpose. The Board observed that remission of the unprocessed grievance to arbitration was such a remedy, and one which might have to be accompanied by an order vacating collective agreement time limits on referral to arbitration if it were to effectively remedy a delinquent trade union's failure to take the grievance to arbitration within those time limits. The Board also observed:

It is also apparent that where there is an allegation respecting the union's refusal to deal with a grievance that many of the facts and issues surrounding the grievance may be resolved in the course of arriving at a determination concerning the union's duty. In those cases it may be desirable that this Board decide the grievance issues as well as the section 60 claim, because the remission of that type of situation to arbitration would only result in a duplication of evidence, time and cost to the parties.

71. In *Imperial Tobacco Products*, [1974] OLRB Rep. July 418, the Board again held that an employer could be added as a respondent to a fair representation complaint for remedial purposes. It observed that the Board could remit a grievance to arbitration or determine the merits of the grievance itself and so remedy the statutory and associated contractual breaches itself. Indeed, in that decision the Board observed that the latter approach might be preferred in some cases:

... where it is first established that the trade union is in breach of its duty of fair representation by, arbitrarily failing to take the grievance to arbitration the Board may assume jurisdiction to interpret a collective agreement in order to fashion meaningful relief for the employee. (See *Joseph Pap.*...) As noted above, this will often necessitate joining the employer who has initiated the sequence of events giving rise to the breach of the union's duty of fair representation. But, it was noted in *Gebbie*... that part of the remedy may be the remission of the grievance to an arbitrator under the collective agreement which raises the dilemma faced by this Board - when should the Board defer to arbitration in a s.60 situation. In many situations, in finding that the trade union has violated s.60 in failing to take an employee's grievance to arbitration, facts will arise that suggest the trade union is unlikely to represent the employee fairly at the arbitration hearing and in such a situation the Board may decide to hear the matter itself...

72. Against this background, in *Nick Bachiu*, [1975] OLRB Rep. Dec. 919, the Board again said that the merits of a grievance and the merits of a complaint that the grievance had not been processed could not be separated as a matter of procedure:

We do not believe that the merits of the grievance and the merits of a s. 60 complaint can be, or should be separated as a matter of procedure. The Board has to know all the circumstances surrounding a grievance to assess whether the trade union has dealt with it in a proper manner. The employer's version will usually be very helpful in making this determination. However, in those cases where the Board finds that a violation of s.60 has been made out, a judgment on the merits of a complainant's grievance will not follow automatically. The Board may adjudicate a grievance where the outcome of grievance arbitration is beyond doubt (*Joseph Pap.*...) or it may do this where there is a concern that grievance arbitration will not provide an effective remedy (as explained in *Imperial Tobacco*). For example, this latter possibility may arise if the violation of s.60 is based on either the bad faith or



discrimination of a trade union. But in other cases, where the outcome of arbitration is problematic and the Board is assured that the trade union will represent the complainant fairly, the more appropriate remedy, in light of the policy underlying s.37 of the legislation, may be to refer the matter to arbitration under the agreement and not for the Board to give its opinion on the merits (although it may retain jurisdiction). Of course this will depend on the peculiar nature of each matter that comes before the Board. (In fact, a successful complainant may not be entitled to a judgment on the merits - see dissent in *Pedalino and United Steelworkers of America*, [1975] OLRB Rep. Nov. 874.) However, this is not to deny that, with experience, the Board may come to the conclusion that, for reasons of economy and expedition it should finally dispose of all established violations. In our opinion the Board and the parties should be prepared to experiment with remedies and no clear rule needs to be articulated - at least we see no need for remedial certainty at this time.

73. The Board first directed referral to arbitration as the primary remedy in a fair representation complaint in *Leonard Murphy*, [1977] OLRB Rep. Mar. 146. In that case, the Board found that the union, through the actions of its "Union Committee", had acted arbitrarily and in bad faith in failing to process the grievances of Murphy and his complainant Shaw against their August 28, 1976, discharges from long-standing employment at The Kingston Whig-Standard Co. Ltd. The Board discussed remedy at paragraphs 35 to 41 of its decision:

35. In this case that arbitrary and bad faith conduct of the Union Committee denied the grievors their chance to have their grievances heard on the merits in arbitration. What remedy will most appropriately rectify this loss?

36. An isolated order for damages against the union would not be an appropriate remedy in the circumstances of this case; it is only in the event that the grievances are ultimately successful at arbitration the grievors will have suffered financially from the union's violation of section 60. If the grievors were properly discharged, the union's mis-management will not have prejudiced the grievors beyond delaying the ultimate resolution of their rights.

37. Since the Board found that the violation of section 60 stemmed from the failure of the Union Committee to direct its minds to the merits of the grievances the Board might direct the union to reconstitute a Union Committee and reprocess the grievances under the terms of section 9 of the collective agreement. On reconsideration the decision might be made either to affirm the company's decision to discharge, to settle the grievances or to submit them to arbitration. The evidence indicates to the Board, however, that the positions of both the union and the company have been solidified over the six month period in question to make any resolution short of arbitration most unlikely. The company has repeatedly indicated that it does not intend to re-evaluate or modify its decision to discharge the two grievors. As well, the general membership of the union voted both on October 7, 1976 and January 6, 1977 to submit the matter to arbitration and has already appointed Mr. R. Sievers as its nominee. It is the opinion of this Board that a direction to the union to reprocess the grievances from the stage of establishing the Union Committee would occasion the repetition of considerations which have already been made by the union in good faith and in a non-arbitrary manner and would not have the effect of persuading either the company or the union to a position of compromise. The prejudice occasioned by further delays involved in remitting the grievances into the ordinary stream of the grievance procedure would not, in these circumstances, be counter-balanced by the prospect of a settlement short of arbitration.

38. Accordingly, the Board finds that a direction to the parties to arbitrate forthwith the grievances will most effectively remedy the violation of the Act. This order is made notwithstanding either the possibility that the Union Committee may not yet have fulfilled its section 9 duty under the collective agreement or the possibility that the Union Committee has already in fact confirmed the employer's decision to discharge the grievors. The order therefore overrides the collective agreement in that [1] it dispenses with the requirement of the parties to proceed through the Union Committee stage as set out in section 9 of the collective

agreement in order to advance to arbitration and [2] it nullifies the effect that section 9 might have in preventing a grievance from proceeding to arbitration if it be found that the Union Committee has properly confirmed the company's decision to discharge the grievors.

39. In the event that the grievances are successful at arbitration, the Board orders that the union pay the compensation covering the period of time occasioned by the union's violation of section 60. The Board takes the view that the union's violation of section 60 began on September 3, 1976 with the meeting between the company, the Union Committee and Mr. Shaw, and that it is being remedied by this decision. Thus if the grievances of either Mr. Murphy or Mr. Shaw are successful the Board orders that the union bear the responsibility for their compensation from September 3, 1976 to the date of this decision.

40. Because of the inherent conflict of interest resulting from the Board's contingent order of damages against the union, the Board further orders that the union be required to engage counsel, jointly chosen by the grievors and the union, to represent the union in the arbitration of the grievances of both Mr. Shaw and Mr. Murphy. While the Board has complete confidence in the union's present intention and ability to represent the grievors in good faith, justice demands that the grievors be protected against the apparent conflict of interest.

41. The Board remains seized of this complaint to resolve any matter arising out of the interpretation of its order.

74. Very shortly after the release of the Board's decision in *Leonard Murphy*, the procedural approach advocated in *Nick Bachiu* was reviewed and disapproved of in *Massey-Ferguson Industries Limited*, [1977] OLRB Rep. Apr. 216. In that case, after reviewing the Board's prior jurisprudence as we have done here, the Board observed:

19. ...The *Bachiu* dictum did not stand for the proposition that the Board would *always* adjudicate the merits of a successful section 60 and the merits of the underlying grievance in one fell jurisprudential swoop. However, the uncertainty about whether the Board would do this in a particular case, or whether it would decide instead to refer the grievance to arbitration resulted in a noticeable tendency toward protracted section 60 proceedings. The problem was that some counsel (complainant, trade union and employer alike), felt compelled to put in all their evidence on the merits of the complainant's grievance so as not to risk an unfavourable disposition on the grievance based on "insufficient evidence". Although much of the evidence which the Board received in respect of the merits of the grievances which came before it under section 60 had, for the reasons outlined in paragraph 18, a very real bearing on the question of whether the trade unions involved were in violation of section 60, some of it was completely without relevance to that issue and would probably not have been introduced but for the possibility of preemptive and automatic grievance arbitration by the Board.

20. Not only did the *Bachiu* dictum result in protracted section 60 proceedings, it was also regarded in some quarters, and we think with some justification, as unfair to the employer who is, after all, only a party to a section 60 complaint because its rights might be affected thereby. Lest there be any misunderstanding on this point, we want to make it clear that the Board holds to the position that an employer should not be permitted to shelter behind a trade union's breach of its duty of fair representation, and thereby escape from its contractual obligation made mandatory by section 37 of *The Labour Relations Act* to answer in arbitration for "its alleged violations of the collective agreement". Accordingly, the Board will continue to use its powers under section 79 of the Act, which include the power to override the specific provisions of a collective agreement, to ensure that an aggrieved complainant is not in that way deprived of the opportunity to obtain full and effective redress for a trade union's wrongful failure to carry his grievance to arbitration (for the Board's initial exercise of this remedial authority, see *Leonard Murphy and International Printing and Graphic Communications Union, Local 482*, Board File No. 1687-76-U discussed *infra*). But that notwithstanding, we do not think it entirely fair to require an employer to defend itself against an alleged contract violation before a contravention of section 60 has been established.

21. With this analysis of the problems inherent in the procedural format suggested

in *Bachiu*, we can now outline the procedure which the Board intends to adopt when dealing with section 60 complaints.

22. Where the Board determines that a trade union has violated its statutory duty of fair representation by failing to take an employee's grievance to arbitration, and where it further determines that arbitration is the appropriate remedy in the circumstances, (which it will not always be, see paragraph 28), the Board will exercise its remedial authority under section 79 of the Act to make an order directing the union to arbitrate the grievance with whatever modifications of the collective agreement appear necessary to ensure that a fair and expeditious arbitration on the merits of the grievance takes place. If the union's denial of fair representation has aggravated the complainant's financial loss, the Board will also, at that time, make an order for damages, apportioning liability as between the trade union and the employer in the event that the grievance succeeds at arbitration, together with whatever further orders that contingent order for damages may necessitate.

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24. The implication of the procedure which the Board utilized in *Murphy*, and which the Board is now adopting, is that a party to an unfair representation proceeding (be it complainant, trade union or employer), need no longer feel compelled to present to the Board all its evidence on the merits of the complainant's grievance against the employer. The reason is that it will have a full opportunity to introduce that evidence before an arbitration board if the union is found to have committed a breach of its statutory duty and arbitration is indicated. We realize, of course, that many section 60 complainants appear before the Board without benefit of legal representation and that they will be no more familiar with this new procedural format than they were with the old. So as not to deny a complainant a full and fair opportunity to make its case, the Board has not been in the past, and will not be in the future, unduly restrictive with respect to the evidence which it allows to be introduced in a section 60 proceeding. The adoption of the new procedure, however, will mean that neither the union nor the employer will be required to respond to evidence which is of no relevance to the issue of whether the union is in breach of its duty of fair representation.

25. To summarize, the procedure which we have adopted for the adjudication of section 60 complaints is designed to avoid the twin pitfalls inherent in the procedure suggested in *Bachiu* - unduly protracted hearings and need for the employer to come forward with evidence to defend its actions in respect of the alleged contract violation before a violation of section 60 has been made out.

26. It should be emphasized that the procedure outlined in this decision does not mean that the parties to an unfair representation proceeding will now have no need of adducing evidence on the merits of the grievance underlying the complaint. The parties (particularly the complainant and the union) will still have an interest in conveying to the Board, through their evidence, a sense of how the complainant's grievance against the employer was likely to have been perceived by the trade union. There is in many section 60 cases, however, a great deal of evidence which, while very pertinent to the question of whether the complainant's grievance would be successful at arbitration, is not relevant to the issue of whether the union has dealt with that grievance in a proper manner.

27. Before concluding, we would add these further comments about the significance of the procedure which we have adopted within the framework of the Board's developing section 60 jurisprudence. Before *Gebbie*, the remedy of referring the grievance of a successful complainant to arbitration was not regarded as available, the Board taking the view that an employer was not a proper party to a fair representation complaint, since section 60 imposed no duty upon it. In order to assess the complainant's damages, the Board, therefore, was required to make a judgment about whether the complainant would have secured a favourable arbitration award. *Imperial Tobacco* then held that an employer, although under no statutory duty to the complainant, could be joined as a party for remedial purposes; and, from that point on, it was no longer necessary for the Board to speculate on the outcome of arbitration.



Nevertheless, the option of final adjudication by the Board was preserved: first, because there was a concern that a trade union which had violated its duty of fair representation by failing to take an employee's grievance to arbitration might not do a sincere job of presenting that employee's case at an arbitration hearing; second, because the Board was concerned about referring unmeritorious grievances to arbitration with the expense, delay and duplication of evidence which that would entail; and, finally, because the remedy of the Board finally disposing of an established section 60 violation had always existed in theory, if not in practice, and the Board saw no immediate need to abandon that remedy simply because it was no longer restricted to an award of damages against the offending trade union.

28. With hindsight, the Board can now see that the uncertainty which was created by the preservation of that remedial option, with its unforeseen procedural ratifications, was neither necessary nor desirable. Should there be a concern now that a successful complainant will not be represented fairly by his union at arbitration, that concern can be met by the Board making an order directing the union to retain counsel acceptable to the complainant, as was done in *Murphy*.

29. It is true that the abandonment of the remedy of final adjudication by the Board of the grievances which come before it under section 60 may serve to delay and increase the costs to the parties in cases where a section 60 complaint succeeds. But that sacrifice is something which we believe, on balance, to be unavoidable. It should be emphasized, though, that not every successful section 60 complaint requires the remedy of arbitration. As we stated in *Murphy*, the whole point of a remedy for a violation of section 60 is to, as nearly as possible, put the parties into the position they would have been in had the unfair representation not occurred. Stated another way, the Board does not view section 60 as conferring upon a successful complainant an automatic right to have his grievance arbitrated. If the grievance is not one which his union would have been required to carry further had it not breached its duty of fair representation, the union should not be required to proceed to arbitration if it decides, after proper consideration, that it still does not wish to do so....

75. The Board has recognized that there are limits to the efficacy and propriety of referral to arbitration as a remedy for breach of section 68. The complainant in *Toronto Hydro Electric System*, [1980] OLRB Rep. Oct. 1561 had been removed from a supervisory position within the bargaining unit represented by the respondent union, after that union presented his employer with a petition threatening illegal work stoppages if he was not removed from that position. The Board found that the union's conduct violated section 68 of the Act. The Board ordered that the employer immediately reinstate the complainant to his former position, and directed that the union compensate him for the monetary loss he had suffered as a result of his removal from that position. In choosing to deal with the termination directly, the Board made these observations:

17. The Board views the union's conduct in this complaint as reprehensible to a degree that necessitates an unequivocal remedial order. The Board's order in any complaint must respond to the special circumstances of the case. This is not, as is common in section 60 complaints, a grievance first arising out of an imputed breach of the collective agreement by the employer followed by a refusal of the union to process the grievance to arbitration. In cases of that kind the Board is reluctant to assess the merits of an employer's conduct in the course of framing a remedial order under section [68] of the Act. The Board generally will not, therefore, dispose of a dispute between employer and employee that is essentially a matter for arbitration. Rather, where the breach of section [68] is grounded in a union's refusal to advance a grievance to arbitration the Board will make an order, with or without procedural conditions, requiring it to do so. (For a review of the Board's rationale for this approach see *Massey-Ferguson Industries Limited*, [1977] OLRB Rep. Apr. 216).

18. This is not that kind of complaint. In this case the grievor's rights were initially violated by the union. The grievor's economic loss arose only when the employer acceded to the union's demands. While there were obvious economic reasons for the employer's

capitulation, it was the employer's response in the end that allowed the union's conduct to work its result.

19. An employer can, in a number of ways, become a participant in a breach of an employee's rights under section [68] of the Act. It can become involved by collusion or, as in this case, by becoming the instrumentality by which the unlawful end is achieved. When an employer's actions are an integral part of the conduct that is being complained of under section [68] any order that redresses the breach of the union's duty of representation by returning the parties to the *status quo* that preceded the breach may, of necessity, affect the employer.

In *Toronto Hydro Electric System* the union had not refused to process a grievance; the complainant had not filed one because he saw it as a futile exercise in the circumstances. However, it is apparent that the Board's decision to deal directly with the complainant's discharge was not influenced by that factor and turned, instead, on the nature of the dispute which gave rise to the discharge and the identity of the real disputants.

76. The remedial approach described in paragraph 20 of the decision in *Massey-Ferguson Industries Limited* has since been followed in *Consumers Glass Company Limited*, [1979] OLRB Rep. Sept. 861, *Corporation of the Town of Hastings*, [1979] OLRB Rep. Nov. 1072, *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338, *North York General Hospital*, [1982] OLRB Rep. Aug. 1190, *Phillip Wayne Bradley*, [1983] OLRB Rep. Mar. 323, *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, *Central Stampings Limited*, [1984] OLRB Rep. Feb. 215, *J. M. Schneider Inc.*, [1984] OLRB Rep. Mar. 467, *The Corporation of the Town of Oakville*, [1984] OLRB Rep. May 731, and *Windsor Western Hospital*, [1984] OLRB Rep. Nov. 1643. In *Savage Shoes Ltd.*, the complainant's recall rights, and hence her employment status, were threatened by her employer's interpretation of the seniority provisions of the collective agreement. In each of the other cases, the employer had discharged the complainant on grounds the complainant sought to challenge.

77. In most of these cases, the union's breach of section 68 resulted from its having acted arbitrarily in failing to sufficiently investigate, consider or discuss with the complainant the merits of the grievance before deciding not to pursue it. The union's object in considering the merits had only been to determine whether the union was likely to win the grievance. There was no suggestion in any of these cases that any group interest entered into the decision, other than a general concern that the union not squander its credibility and limited financial resources on the arbitration of grievances with insufficient prospects of success.

78. In each of these cases, the complainant's grievance concerned action taken by the employer on its own initiative, action which the employer proposed to defend if the matter went to arbitration. In each case, damages and reinstatement to employment or the employee status were sought by the employee and resisted by the employer. Where the Board ordered that the union bear part of any damages awarded at arbitration, the employer was only relieved of exposure to any increase in the complainant's damages which arose as a result of the union's initial failure to process the grievance. The employer retained an active interest in defending its position at arbitration. In the typical case, an initial decision by the union to take the complainant's claim to arbitration would not itself have resolved the claim; the complainant would only have achieved what he or she was after if his or her position prevailed over that of the employer at arbitration. What the complainants in such cases lost when their union decided not to pursue their grievances was the opportunity to contest their employer's position

on the underlying dispute. The likely result at arbitration was the critical contingency in an assessment of the loss the complainant had suffered as a result of the union having made its decision in an improper manner. There is an obvious logic to assessing that contingency by having the parties actually arbitrate the dispute. Of course, a direction to that effect dispenses with assessment of another contingency: the likelihood that the union would have decided to pursue the complainant's grievance had it made the decision in a manner consistent with its duty under section 68 of the Act. This makes sense where the union's decision would also have turned largely, if not entirely, on an assessment of the likely outcome at arbitration, the merits of the grievance are at least debatable and the Board is not satisfied that it would be appropriate to give the union a second opportunity to make that decision in a proper manner, having regard to the nature of the union's violation and the conflict of interest created by exposure to a liability which would now hinge on that decision: see *Savage Shoes Ltd.*, *supra*, at paragraph 63, and compare *The Four Seasons Hotels Limited*, [1984] OLRB Rep. Oct. 1406.

79. This case differs from those in which the Board has directed that the trade union and employer process the complainants' grievance to arbitration. The fundamental difference is that the underlying dispute is not between complainants and their employer; the real dispute is internal to the union. If the union had decided to advocate the complainant's interpretation of the collective agreement, the evidence now before us suggests very strongly that Abitibi would have accepted and acted on that interpretation. As a result, when assessing the damages to the complainants which result from the union's breach of the Act, the likely outcome of a grievance supported by the union is a much less critical contingency than the question whether the union would have decided to support the grievance if it had dealt with that question in a manner which was not arbitrary, discriminatory or in bad faith.

80. With the possible exception of the layoffs in July, 1982, the layoffs which the complainants wish to challenge at arbitration were carried out in accordance with a procedure the employer adopted or continued at the union's request. A challenge in the union's name to the employer's use of that procedure after that request was made and while it remained outstanding would surely be answered with the defence that the union is estopped from challenging the procedure it approved in the October meeting on the Landversitch grievance. It would clearly be unfair for us to fashion a remedy which exposes the employer to liability to the complainants for the adverse consequences to them of a layoff procedure requested by their union. If we were to direct arbitration and require that the employer not raise the estoppel defence, then we would also have to direct that the union bear liability for any damages awarded in arbitration with respect to claims against which the estoppel defence would have been successful. This would leave Abitibi with no reason to resist the position which our order would permit the complainants to assert in the union's name, unless we were also to take up Abitibi's rhetorical request that we tell it what position to take if we direct a referral to arbitration. This all seems a highly artificial and unsatisfactory way to assess damages for which only the union would ultimately be responsible.

81. The dynamics of an arbitration with respect to the July, 1982 layoffs might be different. We have not heard Abitibi's version of the discussion about mill seniority at the union-management meeting of June 23, 1982, and do not know whether a challenge to the July layoffs might be met with an estoppel defence arising from that discussion. Even assuming that it would not, Abitibi's second step answer to the Landversitch grievance does not leave much room for dispute in an arbitration in which the position taken in the name of the union is the same as the position set out in the second paragraph of Abitibi's letter.



82. In short, with the possible exception of losses resulting from the July, 1982, layoffs, it is the union, and not the employer, that will be liable for any damages to which any of the complainants can show they are entitled for layoff out of seniority. Whatever value an arbitration between the employer and the complainants acting in the name of the union might have in assessing whether Abitibi should pay damages to Podlewski in respect of the July, 1982 layoffs, that procedure could not be expected to fairly assess the contingencies which affect an assessment of the union's liability to the complainants for damages in respect of any of the other layoffs. For all these reasons, we doubt whether any direction to proceed to arbitration should form part of the remedy in the circumstances of this case, and we are certain it should not be the means by which the union's liability for damages is ascertained.

83. Accepting at face value the union's claim that its object in deciding whether to support the complainants' position was to act in a manner consistent with the language of the collective agreement and the parties' past practice, one way to determine the appropriate remedy for the union's breach might involve a determination by this Board of the meaning of the collective agreement. This could not and would not be done without first hearing any evidence or argument which any of the parties wish to add to what we have already heard. If we were to find in favour of the complainants' interpretation, we would then go on to assess the damages payable by the union with respect to layoffs after July, 1982, and to determine whether either the union or the employer is responsible for any loss in respect of the July, 1982 layoffs.

84. As the parties' arguments did not address the possible alternatives to a referral to arbitration, we do not propose to come to any final conclusion on this aspect of remedy before having the benefit of their submissions. Each party's written submissions on this issue, if any, are to be delivered to the Board and to the other parties within twenty days of the date of release of this decision. Any party who has filed representations-in-chief within that time may file a written reply to the other parties' timely representations-in-chief within ten days of receipt thereof. It should be clear that one of the alternatives we are prepared to consider and on which we wish the parties to address argument is that the Board proceed to adjudicate the questions raised by the complainants' grievances.

85. Although the means by which the complainants' damages are to be assessed remains to be determined, there should be no doubt that the respondents are liable to compensate the complainants for any loss or damage which can be shown to result from their breach of the *Labour Relations Act*. It is also clear to us that the remedy in this case should include a Notice to Employees prepared by the Board and signed on behalf of the respondents, advising the Mill employees represented by the respondents of the outcome of the Board's findings, their rights under the *Labour Relations Act* and the steps that will be taken by the respondents as a result of the Board's decision. We will defer finalizing the terms of that Notice, however, until we have received and dealt with the further representations contemplated by paragraph 84 of this decision.

86. In addition to preparing and delivering their submissions, if any, in accordance with paragraph 84 of this decision, the parties should now consider whether they can settle or narrow the issues which remain outstanding. To facilitate settlement discussions, we direct that the complainants provide the respondents and intervener with full particulars of the amount and method of calculation of each complainant's damage claim within 30 days of the date of

release of this decision, or such further period as the parties may agree in writing. In that connection, we also direct that the intervener provide the complainants with any information concerning the subject layoff periods which they may reasonably require in order to prepare the required particulars.

#### **DECISION OF BOARD MEMBER L. C. COLLINS;**

I dissent from my colleagues' finding that the respondents breached section 68. I would have dismissed this complaint.

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**0254-85-R** Service Employees International Union Local 204 Affiliated with the S.E.I.U. A.F.L., C.I.O., C.L.C., Applicant, v. **Loomis Messenger Service**, a division of Loomis Courier Service Limited, Respondent, v. Group of Employees, Objectors

**Constitutional Law - Whether messenger service within federal or provincial jurisdiction - Whether integral part of federal transportation undertaking**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *A. Grant* and *W. F. Rutherford*.

**APPEARANCES:** *L. A. Richmond*, *A. Ferens*, *R. Davidson* and *G. Singh* for the applicant; *Carl Peterson* and *Donald Petras* for the respondent; *Gary Kennett* and *Roderick Wood* for the objectors.

#### **DECISION OF THE BOARD; July 19, 1985**

1. This is an application for certification.
2. The name of the respondent is amended to read: "Loomis Messenger Service, a division of Loomis Courier Service Limited".
3. The application covers "drivers" and "walkers" engaged in the respondent's messenger service, operating out of Richmond Street premises in downtown Toronto, and Universal Road in Mississauga. All of the individuals involved are retained on a contractor basis, but the respondent conceded that they would be "dependent" contractors in any event, and the Board, after hearing the submissions of some of the contractors, confirmed the view of the respondent.
4. The respondent's primary challenge to the application was on the basis that its labour relations fell under federal jurisdiction, and the Board accordingly heard the evidence and submissions of the parties on that constitutional issue.
5. The Universal Drive facility in Mississauga houses the Messenger drivers dispatch,

as well as the administrative staff for the full Toronto Messenger Service. Richmond Street is a sub-depot for the service, being a pick-up and delivery point for all documents emanating from or destined for the downtown core. It also serves as a dispatch centre for the “walkers”. The “walkers” are messengers who travel by foot or by bicycle in the central downtown area, where traffic and parking problems make driving less efficient, except where the size of a particular package demands it. The central downtown core is referred to by Loomis as the “streaker” zone, and is an area bounded by Front, Victoria and Queen Streets, and University Avenue. Beyond this “streaker” zone, pick-ups and deliveries are handled by the drivers.

6. While the Loomis Messenger Service offers out-of-the-province service to certain cities, no employee of that Service ever leaves the province. In Toronto documents are collected by the drivers and walkers, and delivered to Richmond Street. From there a Messenger driver will take the load of out-of-province documents to the Expeditair counter at Pearson International Airport. Loomis Messenger Service neither owns nor operates any equipment transporting goods outside the province. When a customer calls for out-of-province service (apart from Quebec), he is given the common carrier’s schedule which will govern delivery of his parcel. Loomis Messenger Service will then arrange for pick-up and delivery of the parcel at the other end, either through a Loomis office or an agent of Loomis.

7. The only additional service which the Loomis Messenger office in Toronto offers is “facsimile transmission”, a form of telecopying between compatible equipment in different cities. Once again Loomis does not own the equipment used for this service, but rather rents and operates it through a combination of Bell Canada and CN-CP Telecommunications. Loomis does have some compatible machines in other cities that it serves, but often the customer will use the Loomis machine in one city to transmit to the customer’s own compatible machine in another. This “facsimile transmission” as a whole constitutes only a tiny percentage of the respondent’s operation, and the respondent placed no reliance on it in argument.

8. On these facts, therefore, it is apparent that Loomis Messenger Service by itself stands in the same position as other provincially-based “forwarding” companies, and its labour relations would fall within the exclusive jurisdiction of the province. See, e.g. *Emery World-Wide*, [1984] OLRB Rep. Oct. 1412; *Cottrell Forwarding Co. Ltd.*, (1981) 33 O.R. (2d) 486 (Div. Ct.); *Cannet Freight Cartage*, (1975) 60 D.L.R. (3d) 472 (F.C.A.). And as the Board indicated in *Airgo Agency Limited*, [1982] OLRB Rep. Sept. 1233, the matter is not affected by the forwarder also acting as the receiver at the other end, so long as it does not operate the actual transport equipment in between.

9. The respondent’s real argument, however, is that the transportation undertaking of Loomis Courier Services Limited, of which Loomis Messenger Service is a division, falls within federal jurisdiction, and that Loomis Messenger Service is an integral arm of that undertaking. It is necessary, therefore, to examine the undertaking of Loomis Courier Service Limited, and its inter-relationship with Loomis Messenger Service.

10. Loomis Courier Service operates a cross-Canada delivery service, as well, on a limited basis, as service to certain border cities of the United States. While Loomis Messenger Service specializes in same-day delivery service, the Courier Service specializes in overnight service. The two operations are run as separate administrative and accounting units, and each advertises its own specialty in its own name. The one area within which the Messenger Service in fact offers a cheaper rate for *overnight* service (where that is specifically what the customer



wants) is in the central area of Toronto itself. For overnight requests outside that area, customers are told by the Messenger office to contact the Courier office. It is only the Courier Service vehicles that are painted the distinctive yellow with the red and blue band; the Messenger Service trucks are designated by a decal. Courier Service drivers are also identifiable by blue uniforms and blue identification badges. Messenger Service personnel wear yellow outerwear and badges. There is a master payroll office for both of the groups in Vancouver, and it appears that the cheques for both bear the corporate name Loomis Courier Services Limited on them.

11. The Courier Service drivers operate out of a large dispatch and warehouse facility on Viscount Road in Mississauga. They are covered by a province-wide collective agreement voluntarily entered into with the Union of Loomis Drivers and Warehousemen. The Viscount Road facility acts as the main clearing house for packages both entering and leaving the province, as well as for distribution to other points in Ontario. While the evidence is not entirely clear (or critical) on this point, it appears that Messenger (as well as Courier) Service parcels from or to Quebec or other parts of Ontario are routed through the Viscount Road distribution-centre. Loomis Courier Service itself makes the Montreal-Toronto connection by having a common carrier haul a Loomis trailer as far as Kingston, where a Loomis driver and cab takes over the load. Loomis Courier drivers do, however, handle the full Ottawa-Toronto haul, and run daily routes by car into Hull and other points in that area of Quebec for pick-up and delivery, as well as regular routes through the Ottawa valley to Hawkesbury, at which point they will cross into Quebec if required. They have also run cross-overs to Buffalo and Detroit from time to time.

12. Loomis Courier drivers operate on regular routes, and Messenger drivers are frequently asked by Courier to make missed pick-ups or handle overflow on Courier orders. This is not a substantial portion of the Messenger drivers' work, and is charged back to the Courier Service at month's end at the same rate applied to other customers. Because of the inaccessibility of the downtown "streaker" area, the Courier Service relies on the Messenger "walkers" for its pick-ups and deliveries in that zone. Courier has worked out a flat rate with Messenger for that zone which is somewhat below that charged to other customers. Both "walkers" and drivers receive their normal percentage of the tariff when engaged on an order from the Courier Service. Courier has no direct radio contact with any Messenger personnel, or vice versa; all requests for Messenger's services by Courier must be routed through the Messenger dispatch, who completes the necessary paper-work for the charge-back at the end of the month.

13. Jack Slyford, the Toronto District Manager for Loomis Courier Service, testified that the "walker" service only came into operation in 1981, as part of the present Loomis Messenger Service. Prior to that time the Courier drivers had to access the downtown core themselves, but most of their business was data-bank pick-ups, which were just outside the core. To the extent downtown pick-ups were required, Courier drivers for the most part (one walker was employed) had to park their vehicles, get out, and pick up the documents. They still do that on occasion, where a large load on a dolly is involved. The present use of the "walkers", Mr. Slyford agreed, is now a "convenience" to the Courier Service. Counsel in cross-examination pursued this in the following exchange:

"The Messenger Service came in in its present form in 1981 at the same time as the "walkers"?"

They put the "walkers" in yes. They're part of the Richmond Street operation.

And you make use of the Richmond operation on the basis of a fee for service?

Yes.

So the Courier Service is another customer of the Messenger Service?

I guess you could look at it that way."

14. The starting point for constitutional jurisdiction over matters of labour relations has been set out many times, for example in *Montcalm Construction Inc.* [1979] 1 S.C.R. 754, as follows:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject"

• • •

The Supreme Court continued in that case as follows:

A recent decision of the British Columbia Labour Relations Board, *Re Arrow transfer Co. Ltd.*, [1974] 1 Can. L.R.B.R. 20, provides a useful statement of the method adopted by the Courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the Courts look at the particular subsidiary operation engaged in by the employees in question. The Court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as 'vital', 'essential' or 'integral'. As the chairman of the Board phrased it, at pp. 34-5:

In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship."

From this one can infer that the result in this case would be no different if the respondent had incorporated a separate subsidiary company to operate its Messenger Service division. The issue, rather, is what the Courts have referred to as the "severability" of the secondary service from the main undertaking. Again in *Montcalm Construction* the Court observed:

"On the one hand, a single enterprise may entail more than one undertaking, e.g., Canadian Pacific Railway's Empress Hotel was found to be an undertaking separate and independent from the railway undertaking in *C.P.R. Co., v. A.-G.B.C. et al.*, [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R. 220 *sub nom. Reference re Application of Hours of Work Act, etc.* On the other hand, two separate corporate enterprises may be found to be included within one single and indivisible undertaking, as in *stevedores* employed by a stevedoring company loading and unloading ships in the "Stevedoring case", *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529, or a trucking company which did 90% of its business for the Post Office in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] 1 W.W.R. 452."

15. Counsel for the respondent submits that in the present case the Messenger Service

is clearly “integral” to the Courier Service as a whole, and relies in particular on the fact that, *as the business is presently structured*, the Courier Service relies on the Messenger Service “walkers” to handle its pick-ups and complete all of its deliveries in the downtown central zone. Counsel submits that the cases require the Board to “take the operation as it finds it”, and not to emasculate it by artificially severing it on the basis of other ways it “might” have chosen to carry on its business.

16. The Courts have, however, made it clear that the constitutional sense of being “integral” requires more than the provision of a “convenience” to the primary federal undertaking. See in particular the decision of Laskin, C.J.C. in the CNR/quarry case of *Nor-Min Supplies Ltd.* (1976) 7 N.R. 603 (S.C.C.). In *Pacific Customs Brokers Ltd.*, 80 CLC 14,022, the British Columbia Supreme Court wrote:

“Customs brokers in my view do not perform any function essential to the maintenance or continuance of the customs service. Undoubtedly they simplify the collector’s task because they are experts in the same way as income tax consultants are experts but they are not essential. The customs service could deal directly with the public and vice versa, if the customs broker did not exist. Albeit the process would be more cumbersome for both sides.”

17. Where the subordinate operation is carrying on an *independent local* operation of its own, only one facet of which is the servicing of the primary federal undertaking in question, the clear predominance of the jurisprudence is to find that operation severable, and provincial in jurisdiction. The question of constitutional control clearly cannot vacillate back and forth depending on the customer. In *Cannet Freight Cartage Ltd.*, (1975) 60 D.L.R. (3d) 473, [1976] 1 F.C. 174, for example, the Federal Court of Appeal wrote:

“In my view, whether or not employees whose work is physically upon or in connection with a railway may be said to be employed ‘upon or in connection with’ the railway within s. 108 read with s. 2 of the *Canada Labour Code* must be determined, keeping in mind the constitutional limitations on Parliament’s powers in the labour field, having regard to the circumstances in which the work takes place. Clearly a person employed by the railway company to carry out a part of the transportation services provided to its customers falls within those words even though he does not physically come in touch with the right of way or rolling stock. Just as clearly, a person working for a local businessman in a Province does not fall within those words even though his work, in connection with that man’s purely local operation, requires that he perform a large part or all of his services physically on the railway’s right of way or rolling stock.

For example, if the railway has pick-up service in a city as a part of its overall transportation service, I should have thought that the employees concerned would be regarded as employed in connection with the railway. If, on the other hand, the railway merely supplies railway cars to its customers to be loaded by them and unloaded by consignees, I should have thought that the employees of the consignor, while loading the car for their employer, would continue, from a constitutional point of view, to be working upon or in connection with their employer’s business and would not *pro tem* become railway workers.”

Similarly, the British Columbia Labour Relations Board observed in *Kuehne & Nagel International Ltd.*, [1979] 1 Can L.R.B.R. 156, at page 167:

“But it is a mistake to assume that because a service offered by an employer relates to or is somehow connected with a branch of the Federal Government, the employment relations of that employer lose their independent constitutional value. If that were so, then an employer whose employees offer counsel or advice in relation to Federal income tax laws and, to carry the analysis to its absurd extreme, a lawyer offering advice and legal services to clients in



relation to all manner of federal agencies and programs, would be subject in their employment relations to the Canadian Labour Code. *The point is that the services offered by such employers, like the services offered by a custom-house broker, are extended and provided to the public. The services are not conceived nor made available for the purpose of becoming or being an indispensable cog in the great wheel of the Federal Government; the Federal Government is quite capable of carrying on its functions in the absence of the employers and their employees who may earn a livelihood by assisting members of the public in their relations with the Government.*”

[emphasis added]

18. On the other hand, when the only, or virtually only, *raison d’etre* of the subordinate undertaking is in fact to service the federal undertaking, to be “a cog in its wheel”, as the above passage put it, the jurisprudence points the other way, whether it be the provision of local cartage service for a cross-Canada trucking terminal, as in *Reimer Express*, [1969] OLRB Rep. April 58, or office services for the same, as in *Direct Winters Transport*, [1973] OLRB Rep. Aug. 430, or ticketing and baggage handling for an inter-provincial bus line, as in *Miwy Co. Ltd.*, [1984] OLRB Rep. Sept. 1249. That, however, is not the situation in the present case. The respondent herein clearly does have an independent local business purpose, serving the public at large, and the Loomis Courier Service is, and is treated by the respondent as, simply another of its customers.

19. The Canada Board decision in *Patry*, released August 13, 1982 and the cases cited therein, demonstrate how a single operating enterprise can be split for constitutional purposes into differing jurisdictions, so long as its component parts are severable. In light of the collective agreement voluntarily entered into here by Loomis Courier Service Limited to cover only its Courier Service employees, counsel for the respondent is left with little room to argue before the Board that its overall operation is one and indivisible for the purposes of labour relations, and that any declaration by the Board to the contrary would “emasculate” its present organization.

20. Accordingly, even assuming that the Loomis Courier Service meets the test for federal jurisdiction set out in such cases as *A-G. v. Winner*, [1954] 4 D.L.R. 657 (P.C.) and *Tank Truck Transport*, (1960) 25 D.L.R. (2d) 161 (Ont. H.C.), we do not find the operation of the respondent Loomis Messenger Service to be so “integral” to the Courier undertaking, as that word is used in the cases, as to have the regulation of its labour relations fall outside the provincial sphere.

21. As agreed, the Board will await the further advice of the parties with respect to the description of the appropriate bargaining unit.

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**0151-85-R Ontario Nurses' Association, Applicant, v. McKellar General Hospital, Respondent**

**Certification - Practice and Procedure - Parties excluding casual nurses from scope clause of part-time agreement - Whether applicant stopped from seeking certification for casual employees subsequently**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

**DECISION OF THE BOARD; June 20, 1985**

1. This is an application for certification in which the parties have agreed to waive their right to a formal hearing before the Board and have requested the Board deal with the application before it based upon the material filed in this matter and the parties' written submissions.

2. The applicant and the respondent were parties to two collective agreements on the date of the making of this application, one relating to a full-time bargaining unit and the other relating to a part-time bargaining unit. The bargaining units are described in those agreements as follows:

“Full-time

ARTICLE A - RECOGNITION

A.1 The Hospital recognizes the Ontario Nurses' Association as the sole and exclusive bargaining agent for all graduate and registered nurses employed by McKellar General Hospital at Thunder Bay engaged in direct nursing care of patients, save and except the Director of Health Services, Head Nurses, and persons above the rank of Head Nurse and those persons regularly employed for less than an average of five (5) tours per week.

Part-time

ARTICLE A - RECOGNITION

A.1 The Employer recognizes the Ontario Nurses' Association as the sole and exclusive bargaining agent for all graduate and registered nurses employed at McKellar General Hospital in a nursing capacity on a regular schedule of not less than one (1) but not more than (4) tours per week save and except the Director of Health Services, Head Nurses and persons above the rank of Head Nurse.”

3. It is common ground between the parties that the respondent employs graduate and registered nurses in a nursing capacity on a casual basis, that is, on a basis that excludes them from both of the collective agreements between the parties. While the applicant did acquire bargaining rights for the nurses employed on a casual basis by reason of a certificate issued by the Board to the predecessor of the applicant on September 7, 1967, the parties are agreed that as of the date of the making of this application, the applicant did not have bargaining rights for those nurses for whom it now seeks bargaining rights through this application.

4. The respondent objects to this application on the following grounds:

“The respondent opposes the application for certification on the following grounds:

- (i) The original certificate did not exclude casual nurses;
- (ii) The Applicant and its predecessor agreed to exclude those nurses it now seeks certification for;
- (iii) The applicant is therefore barred and estopped from now seeking certification for a group of nurses whom it has voluntarily agreed to exclude from the part-time unit;
- (iv) The appropriate procedure given all the circumstances is for the Applicant to first seek through negotiations to amend the existing recognition clause in the part-time Collective Agreement.
- (v) If the Board, notwithstanding the foregoing, wishes to consider the application on its merits and if the Association has the necessary membership support, the Respondent submits that the Applicant should not be issued a third certificate which would fragment the normal bargaining structure for nurses in the hospital but rather should direct the parties through negotiations to amend the existing recognition clause of the part-time Collective Agreement accordingly.”

5. In our view, the objections raised by the respondent have no merit. The respondent does not assert any basis for establishing an estoppel against the applicant seeking to once again obtain bargaining rights for the casually employed nurses of the respondent since the respondent does not even suggest any detriment arising from the applicant's or its predecessor's conduct. Furthermore, the applicant can only amend the existing recognition clause in the collective agreements with the agreement of the respondent. The applicant cannot compel the respondent to amend the collective agreements. The applicant can only legally compel the respondent to bargain with it in respect of nurses employed by the respondent on a casual basis if the applicant has obtained the right to do so under the *Labour Relations Act*, either by certification or voluntary recognition. Since the respondent does not assert that it has agreed to recognize the applicant as the bargaining agent for the employees in question, the only route open to the applicant to collectively bargain on behalf of those employees under the *Labour Relations Act* is through certification. As for the last submission of the respondent, the Board does not have the authority under the Act to do what the respondent suggests. The Board, in this proceeding, can only either dismiss the application for certification or issue a certificate to the applicant. It cannot, in a certification application, direct the parties to the proceeding to change their current bargaining structure.

6. Having regard to the submissions of the parties, and since it appears to the Board that the employees for whom the applicant seeks bargaining rights are the only nurses employed by the respondent for whom no trade union holds bargaining rights, the Board finds that all graduate and registered nurses employed by the respondent at Thunder Bay engaged in direct nursing care of patients, save and except the Director of Health Services, Head Nurses, persons above the rank of Head Nurse, and those persons for whom the applicant or any other trade union held bargaining rights on April 19, 1985, the date of this application, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the



application was made, were members of the applicant on April 30, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A certificate will issue to the applicant.

9. The Board, while certifying the applicant in respect of the bargaining unit described above, does recognize that a better collective bargaining structure might exist for these two parties if there were less than three bargaining units of nurses employed by the respondent. It is open to the parties to agree, at any time, to amend their collective agreements in order to reduce the number of bargaining units represented by the applicant and thereby create a more comprehensive bargaining structure.

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**0154-84-R Ontario Secondary School Teachers' Federation, Applicant, v. Ottawa Board of Education, Respondent**

**Certification - Employee - Whether night school teachers employed by school board covered by *Labour Relations Act* or *School Boards and Teachers Collective Negotiations Act* - Meaning of "teacher" considered**

**BEFORE:** *R. A. Furness*, Vice-Chairman, and Board Members *P. Grasso* and *J. A. Ronson*.

**APPEARANCES:** *Morris A. Green*, *Bert Callum*, *Bill Reith* and *Jim Forster* for the applicant; *B. H. Stewart*, *M. Weeks* and *R. Lintell* for the respondent.

**DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER P. GRASSO; July 4, 1985**

1. The applicant has applied for certification with respect to a proposed bargaining unit of "all teachers employed by the respondent teaching credit courses in its night school programmes, save and except supervisory officers and those above the rank of supervisory officers". The respondent in its reply has stated that the appropriate bargaining unit ought to be expressed in terms of "all instructors employed by the respondent who teach credit courses (credit and non-credit) in continuing education programmes of the respondent, save and except administrators and assistant administrators, and those above the rank of administrator and assistant administrator. In addition, the respondent has noted that it considers principals to be above the rank of administrator or assistant administrator. The respondent informed the Board at the hearing that it was content to have the status of the applicant as a trade union under section 1(1)(p) of the *Labour Relations Act* determined by the Board in File No. 0264-84-R and that it is prepared to be bound by that decision. At this time, the Board has not issued its decision in Board File No. 0264-84-R.

2. There are various issues before the Board, including the community of interest of

the persons affected by this application and the proposed exclusion of persons from the bargaining unit on the ground that they exercise management functions. However, the parties agreed that the Board should initially determine the issue of whether this Board has jurisdiction to entertain this application for certification. Section 2(f) of the *Labour Relations Act* provides:

This Act does not apply,

• • •

- (f) to a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*, except as provided in that Act.

If the persons who are affected by this application are found to be teachers as defined in the *School Boards and Teachers Collective Negotiations Act* ("Bill 100"), then the Board does not have jurisdiction to entertain this application for certification. On the other hand, of course, if the persons who are affected by this application are not teachers as defined in that Act, then the Board has jurisdiction to entertain this application and deal with the additional issues of community of interest and the exclusion of persons who exercise management functions within the meaning of section 1(3)(b) of the *Labour Relations Act*.

3. The facts in this matter are not in dispute. The respondent provides public education outside its regular day school elementary and secondary school programmes to thousands of persons of all ages in the City of Ottawa and surrounding areas. Such education is under the direction of the respondent's Continuing Education Department which provides educational programmes at various times of the day (including evening periods outside of the "regular school day" as defined in the *Education Act*, R.S.O. 1980, c.129, as amended by S.O. 1980, c.47, s.17-21; and S.O. 1982, c.20, s.2 and S.O. 1982, c.32 and Regulations thereunder), Monday to Saturday and at all times of the year (including periods outside the "regular school year" as defined under the *Education Act* and Regulations). Courses are generally taught by part-time instructors. Completion of some of the courses offered qualify a student for a secondary school graduation diploma (SSGD) or the honour diploma (SSHGD); these are generally referred to as "credit courses". Some of the other courses provided are referred to as general interest courses or non-credit courses; others are in basic education, English as a second language and many others. There are some 80,000 persons enrolled in three semesters of the respondent in Continuing Education courses.

4. Credit courses are given in the respondent's four programmes under the Continuing Education Department as follows:

1. Evening credit which are given for eleven months of the year (not for most of the month of August);
2. Saturday morning classes;
3. Adult day school and four summer school which are make-up courses, get-ahead programmes and adult programmes. Evening credit courses are also provided under this heading; and
4. Summer school:

(i) “Make-up courses” and “Reach Ahead” programmes.

(ii) Evening credit.

These courses are all funded in part by the province. The province also funds the following non-credit programmes delivered by the Continuing Education Department of the respondent:

1. Adult basic education;
2. English as a second language or French as a second language;
3. Driver education; and
4. Heritage language.

Certain non-credit programmes are not funded by the province and are delivered by the Continuing Education Department of the respondent are as follows:

1. General interest programmes which are given in both English and French;
2. Community education (lighthouse);
3. Senior citizens programmes given in both English and French;
4. Extra curricular music; and
5. A variety of summer courses.

5. The terms and conditions of employment of continuing education instructors are not covered by the terms of the collective agreement between the respondent and the Ontario Secondary School Teachers’ Federation, District 26 and L’Association des Enseignants Franco-Ontariens Unite Ottawa Secondaire. From 1976 onwards, attempts were made by the branch affiliate in each set of negotiations to gain access to continuing education positions for regular day school teachers. These attempts were only partially successful in that regular day school teachers who were redundant with respect to the system had priority access to school and night school teaching in the continuing education programme. At no time, however, were the terms and conditions of instructors in any continuing education programme subject to the terms of the collective agreement, except that contract teachers in the regular day school programme who, in addition to their day school contract teaching and other duties, taught in the continuing education programme in the evening school credit portion or in the summer school programme portion had their rates established by Article 15 as illustrated in the current collective agreement. Article 15 provides:

#### ARTICLE 15 - CONTINUING EDUCATION

15.01 The parties agree that the rates for Continuing Education Teachers and administrators who are covered by the provisions of this Collective Agreement and who teach credit subjects at the secondary level will not be amended except by mutual agreement.



15.02 A list of proposed Continuing Education teaching positions will be made available to Teachers in the service of the Employer prior to outside advertisement. The Employer will give preference to existing staff who are qualified for the available Continuing Education positions and priority to redundant Teachers identified for lay-off under the provisions of Article 18.

6. Many of the Continuing Education Teachers in the Evening Credit Programme (Fall, Winter and Summer), Summer Make-Up Programme and Summer Reach-Ahead ("summer school") and Saturday Morning Credit teach in the regular day school and, as such, are on statutory contract (probationary or permanent) with the respondent. Their Continuing Education Teaching duties are treated quite separately from their contract duties in the regular day school and are covered by separate contract. This separate contract is entitled "Employment Contract" and states that it is a letter to confirm the employment of the person as an instructor with the Continuing Education Department of the respondent. The letter refers to personal information about the instructor and sets forth the nature of the course to be taught, for example, whether academic, credit or non-academic with further indications whether it is an interest course, English as a second language, French as a second language, after-four music and/or piano, heritage language, lighthouse, adult basic education or driver education. The contract indicates the time and the termination of the teaching period. The details of the salary to be paid are set forth on the employment contract together with benefits with respect to, for example, vacation pay and statutory holiday pay. The employment contract also states that the respondent reserves the right to cancel or reschedule classes. The employment contract also states that the letter does not constitute a commitment for continued or future employment with the Continuing Education Department and that courses are to be cancelled if sufficient registration is not received and maintained for the duration of the programme. The employment contract also states that continued education depends on these factors and on the instructors' satisfactory teaching performance. Their rates of pay, as indicated earlier, may be established pursuant to the collective agreement. Effective February 1, 1984, the rates for non-academic or interest courses ranged from an hourly rate of \$11.50 to \$18.67. The rates for the academic or credit courses range from \$18.67 per hour to \$20.87 per hour. The top rates are paid to a qualified or non-qualified person who has taken a course in adult education. For summer school the rate is \$19.77 per hour.

7. Some Continuing Education Teachers in the credit programmes also teach in the regular day school programme of other boards of education or separate school boards of education, for example, the Carleton Board of Education, the Ottawa Roman Catholic Separate School Board and the Carleton Roman Catholic Separate School Board and, as such, are on statutory contracts with those boards of education. They are in addition on Continuing Education Contracts with the respondent and their rates of pay are established by the respondent as referred to previously.

8. Regulation 822/82 under the *Education Act* deals with the school year and school holidays. The programme in the regular day schools must start on or after the 1st day in September and end on or before the 30th day of June. A school year in a regular day school is required to include a minimum of 194 school days of which nine days may be designated by the respondent as professional activity days. Every Saturday and Sunday is required to be a holiday. With respect to continuing education classes, the year, as it pertains to credit courses, is divided into three terms, each of which is an entity unto itself, consisting of 85 days for terms 1 and 2, and 24 days for term 3. The instructors have two days of professional activity,

one during the fall term and the other during the winter term. No allowance has been made for professional activity days related to school closing, promotion meetings or end-of-year marking. Heritage language classes are offered, for the most part, on Saturday, with some operating on Sunday.

9. Regulation 262 made under the *Education Act* refers to elementary and secondary schools. It provides that with respect to regular day schools, the school day shall begin no earlier than 8:00 a.m. and end no later than 5:00 p.m. For credit courses in continuing education classes for the adult day school during terms 1 and 2, courses are offered from 8:45 a.m. to 4:20 p.m., five days a week, and each course consists of 126 hours of instruction. Term 3 courses are offered from 8:30 a.m. to 1:20 p.m., five days a week for a total of 112 hours. For evening credit courses during terms 1 and 2, courses are offered from 6:45 p.m. to 10:15 p.m., two nights a week for a total of 126 hours. During term 3, courses are offered from 6:30 p.m. to 10:10 p.m., four nights a week, for a total of 112 hours of instruction. For Saturday morning classes, the hours are from 9:00 a.m. to 12:30 p.m. on Saturdays commencing in September and ending in the following June. For summer make-up and reach-ahead programmes, the hours are on Mondays to Thursdays in the evenings, 7:00 p.m. to 10:00 p.m. In addition, the hours are from Monday to Friday daily, 8:30 a.m. to 1:20 p.m. for July and part of August.

10. Credit courses during the day time are offered at the Parkway Adult Day School in English and at the Ecole des Adultes Le Carrefour in French. The hours of instructions are from 8:45 a.m. to 4:15 p.m., Monday to Friday. Due to overcrowding at the Parkway location, it is necessary to also offer courses at the Sir John A. Macdonald High School. A section of classrooms has been allocated for this purpose at the latter location and is separate from the classrooms used by the regular student population of the school. Adult students are not permitted to use the library facilities on a regular basis unless they produce their student identification card. Accommodation has been made in the timetable to allow adult students to use the school cafeteria at lunchtime prior to the regular high school students. The adult programme at the Sir John A. Macdonald High School has its own administrative and counselling office within the section of classrooms referred to and is separate and distinct from the regular administrative office of the school. Credit courses offered in the evenings are at three locations, Fisher Park High School, Hillcrest High School, both in the English language and at the Andre Laurendeau Ecole Secondaire in French. Hours of instruction are 6:30 or 6:45 p.m. to 10:00 or 10:15 p.m. on Mondays to Thursdays.

11. Adult basic education courses in the daytime are offered at both adult day schools and in three community locations, including a church and the Ottawa Community Centre locations on Heatherington Road and Banff Avenue. Evening courses for credits in adult basic education are offered at the High School of Commerce two evenings per week from 7:00 to 9:00 p.m. during regular continuing education terms. English second language daytime classes are held at a high school and a public school with the course hours from 9:00 a.m. to 4:00 p.m., Mondays to Fridays. In both locations a separate section of classrooms has been allocated for the adult population and there is a separate administrative office. English second language evening classes are held at the high school four evenings a week, Mondays to Thursdays, from 7:00 to 9:00 p.m.

12. Credit course students take an average of 2.5 courses per 17-week term in daytime courses. Students taking courses in the evenings take an average of 1.3 courses per term. The



maximum course load is four courses in the daytime and two courses in the evening per term. With respect to adult basic education, students follow an individualized type of instruction and average three hours of classroom time per day, five days a week, during a 17-week term in daytime classes. Students registered in an evening class attend classes for four hours per week on a 12-week term. English second language and French second language classes are offered on various systems of hours per week or as evening classes.

13. In the respondent's adult day schools and evening credit programmes 111 instructors were employed during the term from February to June of 1984. Of these, 101 held Ontario teaching certificates and ten taught with a letter of permission. In the evening programme, 72 of the 77 instructors taught one course, that is three and a half hours twice a week. Five teachers taught two courses, that is three and a half hours four times a week. In the adult day schools, the 34 teachers employed were teaching from one and a half to six hours. As stated earlier, Continuing Education Teachers are paid at the hourly rate of \$18.83 when first hired, and \$20.87 when they have accumulated a total of 288 hours of instruction time to adults and have completed a course in instructional techniques for teachers of adults. Present incumbents whose work has been satisfactory are offered positions from term to term. As required by Article 15 of the collective agreement referred to earlier, vacancy lists are distributed to all regular day schools and regular teachers are given preference with regard to evening teaching positions. In the event that there are vacancies, the vacancies are advertised in the local newspapers. Applicants for day or evening continuing education courses must provide proof of certification and references. Interviews and hiring are done by the administrators of the various programmes. All contracts are maintained in the central office under the jurisdiction of the personnel administrator.

14. All teachers are hired session by session, however, especially in the adult day schools, there is an unwritten understanding that teachers whose performances are satisfactory will have their contracts renewed. Teachers whose performance has been unsatisfactory have been terminated. Administrators and assistant administrators of evening courses are automatically continued. Only administrators are on statutory contract with the respondent. There are eight such positions, namely, one principal of continuing education, three vice-principals of continuing education, two guidance teachers of continuing education, one co-ordinator of French programmes and one co-operative education co-ordinator. Evening courses administrators, assistant administrators and teachers of all adult courses, day or evening, are all on term contract. The hiring of all teachers for day and evening programmes is, of course, conditional on the volume of registration.

15. The Continuing Education Department is responsible for the administration of the summer school programme of the respondent. Staffing of reach-ahead and make-up courses in 1983, was effected by the information bulletin (pink listing) issued by the applicant. Previous to 1983 and 1984, approximately ninety-five per cent of the Ottawa Board's summer staff in these programmes were regular daytime teachers with the respondent or the Carleton Board. In 1983, less than one per cent of the teachers hired in these programmes were regular daytime teachers from the two Boards. In 1983, 68 teachers holding an Ontario teacher's certificate were hired and eight teachers were hired on a letter of permission. To date, approximately 78 instructors have been hired for the 1984 programme and all hold an Ontario teaching certificate and approximately 72 are on a statutory contract with a board of education. Instructors are hired to teach summer school on an annual basis. The length of contract is usually 24 instructional days. An instructor has the option of choosing one reach-ahead course



(111 hours of instruction), or one or two make-up courses (55-1/2 hours of instruction). Remuneration is on an hourly basis at the prevailing continuing education scale. For 1984, this rate was \$18.90 per hour (plus four per cent vacation pay) and directors are paid \$3,668.00 plus four per cent vacation pay to administer the programme. An assistant director is hired at each of the four summer school sites and they are paid for three hours per day for a total salary of \$1,660.80 plus four per cent vacation pay. Subject co-ordinators are hired at each location, and in addition to their teaching salary, are paid a responsibility allowance of \$300.00.

16. The principal of continuing education is the principal of summer school. A director is hired for each summer school location and carries out the day-to-day administration and supervision. The director is also responsible for the hiring of staff in consultation with the principal. An assistant director is hired and assists with the registration and ongoing administrative tasks. The subject co-ordinators referred to earlier have the responsibility for curriculum delivery, text books and the setting up of examinations in addition to their teaching assignment. With respect to Saturday classes, four instructors have been hired for this ten-month assignment. Two of the four also taught one evening credit course in the fall and winter terms. The remaining two teachers taught only on Saturday. The final responsibility for the supervision of staff and programmes rests with the principal of continuing education. This task is delegated to the various administrators of programmes.

17. It was the position of the applicant that the instructors fall within the definition of "teacher" found in the *Education Act* in section 1(1).66 since they hold valid certificates of qualification or letters of standing in an elementary or a secondary school in Ontario. It was also the position of the applicant that all teachers other than "occasional teachers" (as those two terms are defined in the *Education Act* in sections 1(1).66 and 1(1).31) fall within the scope of Bill 100 in that the provisions of the *Education Act* require that all such teachers be employed under the form of contract prescribed in Regulation 277. It was the view of the applicant that the provisions of Bill 100 were broad enough to include the instructors affected by this application. It was argued that the requirements in section 9(4) of Regulation 262, which states that the requirements for a continuing education class are to be the same as the requirements for day schools under the *Education Act* and its regulations in respect of 'the duties and qualifications of and the requirements for teachers and principals', also supported the argument that teachers employed in the night school programmes have to be hired under the form of contract provided for by Regulation 277. The applicant concedes that the form of contract currently provided for under Regulation 277 appears to contemplate the employment of teachers in the regular school year and does not readily fit the format required for teachers in night school programmes. The applicant proposes and argues that instructors employed in night school programmes and other programmes outside the regular school programme have a right under the *Education Act* to a written contract of employment. The absence of regulations for an appropriate form of contract for all of the school programmes in which teachers might be employed did not, in the view of the applicant, take away such a statutory right. The applicant also argued that the instructors did not fall outside the statutory scheme of the *Education Act* because the respondent classified them as instructors rather than teachers any more than the teachers who were employed as co-ordinators in *Ontario Teachers' Federation v. Metropolitan Separate School Board*, (1976) 13 O.R. (2d) 499 ceased to be teachers. In relying on the authority of the Ontario Court of Appeal in that case, the applicant reasoned that because the instructors in the night school courses have the requisite qualifications as teachers under the *Education Act* and were not occasional teachers, they were deemed to

be employed under an appropriate form of contract. The applicant concluded its argument by adopting the position that instructors fell within the definition of teacher in section 1(m) of Bill 100, which states as follows:

“teacher” means a person,

- (i) who holds a valid certificate of qualification as a teacher in an elementary or secondary school in Ontario,
- (ii) who holds a letter of standing granted by the Minister under the *Education Act*,
- (iii) in respect of whom the Minister has granted a letter of permission under the *Education Act*,

and who is employed by a board under a contract of employment as a teacher in the form of contract prescribed in the regulations under the *Education Act*, but does not include a supervisory officer as defined in the *Education Act*, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month.

18. It was the position of the respondent that the instructors are not contract teachers and that Bill 100 does not apply to them because they do not fall within the definition of teacher contained in section 1(m). The respondent argued that since the instructors were not teachers under Bill 100, they were, therefore, to be considered by the Board as falling within the provisions of the *Labour Relations Act* with respect to their labour relations with the respondent. The respondent argued that section 230 of the *Education Act* did not apply to instructors in any kind of programme for Continuing Education. The respondent reasoned that the form of contract envisaged by section 230 and Regulation 277 did not apply to teaching duties other than those performed during the regular school year as set forth in Regulation 822. In the view of the respondent, the night school programmes did not easily fit into the definitions of “school day” and “school year” contained in that regulation. The respondent relied upon the “regular school year” as understood and reasoned by the Board in *The Board of Education for the City of Windsor*, [1978] OLRB Rep. July 699. Section 230 of the *Education Act* provides:

230.-(1) A full-time or part-time teacher who is employed by a board and who is not an occasional teacher shall be employed as a permanent or a probationary teacher.

(2) A memorandum of every contract of employment between a board and a permanent teacher or a probationary teacher shall be made in writing in the form of contract prescribed by the regulations, signed by the parties, sealed with the seal of the board and executed before the teacher enters upon his duties, but if for any reason such memorandum is not so made, or has not been amended to incorporate any change made in the form of contract so prescribed, every contract shall be deemed to include the terms and conditions contained in the form of contract prescribed for a permanent teacher.

19. In resolving the issue of whether the Board has jurisdiction to entertain this application for certification, the appropriate place to start is by considering the various variations and definitions of the term “teacher”. Section 1 of the *Education Act* provides various definitions which are of assistance. Section 1(1).66 defines “teacher” as meaning a person who holds a valid certificate of qualification or a letter of standing as a teacher in an elementary or secondary school in Ontario. In the next subsection, namely, 1(1).67 “temporary teacher” is defined as meaning a person employed to teach under the authority of a letter of

permission. A “part-time teacher” is defined in section 1(1).33 as meaning a teacher employed by a board on a regular basis for other than full-time duty, while section 1(1).31 refers to “occasional teacher” as meaning a teacher employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year. A “permanent teacher” is defined in section 1(1).35 as meaning a teacher employed by a board under a permanent teacher’s contract made in accordance with the regulations and includes a teacher whose contract is deemed to include the terms and conditions contained in the form of contract prescribed in the regulations for a permanent teacher.

20. All of the instructors employed in the night school programmes have the qualifications required by section 1(1).66 of the *Education Act*. There is nothing contained in the provisions of section 230 of the *Education Act* or section 231 of the same Act which would lead the Board to conclude that the instructors ought not to be regarded as teachers for the purposes of either section 230 which was referred to earlier or section 231 which provides as follows:

231.-(1) Unless otherwise expressly agreed and subject to subsections (2) to (5), a teacher is entitled to be paid his salary in the proportion that the total number of school days for which he performs his duties in the school year bears to the total number of school days in the school year.

(2) Subject to subsection (3), a permanent, probationary or temporary teacher is entitled to his salary for a total of twenty school days in any one school year in respect of his absence from duty on account of his sickness certified to by a physician or on account of acute inflammatory condition of his teeth or gums certified to by a licentiate of dental surgery, but a board may in its discretion pay the teacher his salary for more than twenty days absence from duty on account of such sickness or such tooth or gum condition.

(3) A part-time teacher is entitled to his salary for 10 per cent of the periods of instruction and supervision specified in the agreement for his employment in any one school year in respect of his absence from duty on account of his sickness certified to by a physician or on account of acute inflammatory condition of his teeth or gums certified to by a licentiate of dental surgery, but a board may in its discretion pay the part-time teacher his salary for more than 10 per cent of the periods of instruction and supervision in respect of his absence from duty on account of such sickness or such tooth or gum condition.

(4) Every teacher is entitled to his salary notwithstanding his absence from duty in any case where, because of exposure to a communicable disease, he is quarantined or otherwise prevented by the order of the medical health authorities from attending upon his duties.

(5) A teacher is entitled to his salary notwithstanding his absence from duty by reason of a summons to serve as a juror, or a subpoena as a witness in any proceeding to which he is not a party or one of the persons charged, provided that the teacher pays to the board any fee, exclusive of travelling allowances and living expenses, that he receives as a juror or as a witness.

(6) If it appears to the judge on the trial of an action for the recovery of a teacher’s salary that there was not reasonable ground for the board disputing its liability or that the failure of the board to pay was from an improper motive, he may award as a penalty a sum not exceeding three months salary.

(7) For the purposes of subsection (6), the failure of a board to pay a teacher’s salary may be extended by a judge to include failure to pay a teacher’s salary when an agreement for his



employment has been made by the board but no written memorandum has been made and executed as required by section 230, if the judge is satisfied upon the evidence that the refusal of the board to pay the salary by reason of the absence of a memorandum in writing is without merit.

It was not suggested that these instructors are to be regarded as "occasional teachers" within the meaning of section 1(1).31. The definitions in section 1(1) of the *Education Act* which have been referred to previously lead the Board to conclude that the instructors in the night school programmes are within the purview of section 230(1) because they are full-time or part-time teachers employed by the respondent and are not employed as occasional teachers.

21. If the instructors are within the provisions of section 230(1), they are required to be employed under the form of contract prescribed by the regulations under the *Education Act*. It may be argued that it could not have been the intention of the Legislature to include instructors in the night school programme within the scope of this requirement because the form of contract provided for in Regulation 277 was neither compatible nor suitable for the format in which the night school programmes were being offered to the public. The respondent argued that Regulation 262 envisaged continuing education classes being based upon the unit of a class rather than upon the unit of a school year while both section 231 of the *Education Act* and Regulation 277 envisaged an employment relationship between the respondent and a teacher based upon a school year. The respondent reasoned that in these circumstances it could not have been the intention of the Legislature to bring the instructors in the night school programmes within the provisions of section 230. This argument was considered in the arbitration between the *Ottawa Board of Education and Ontario Secondary School Teachers' Federation, District 26 and L'Association des Enseignants Franco-Ontariens Unite Ottawa Secondaire* (unreported decision dated March 21, 1984) which was chaired by Professor Carter. At pages 13 and 14 of the award the board of arbitration stated as follows:

We have some difficulty with this argument. As we read the *Education Act*, and Regulation 262, there is no express language either precluding the employer from organizing its continuing education programme around the school year or requiring the employer to organize the adult day schools in the format now being used by the employer. What has happened here is that the employer has organized the adult school day in a particular manner, and is now arguing that this form of organization is incompatible with the form of contract required by the Act and regulation 277. This argument puts the cart before the horse by having the employer's method of organizing its continuing education programme dictate the extent to which the *Education Act* applies. The application of the *Education Act*, however, is a matter of law and its application must dictate the manner in which a school board organizes the delivery of continuing education.

22. In our view, there is nothing in either the *Education Act* or the regulations thereunder which provides that there should be two classes of teachers, namely, one for the regular day school programme and one for teachers involved in the delivery of Continuing Education in its various forms. Section 230 of the *Education Act* speaks of teachers who are employed by the board and apart from the exception made for occasional teachers, does not distinguish between teachers who are employed in the regular day school programme and those who are otherwise employed by a board. In our view, the instructors in the Night School Programmes and other teachers involved in the Continuing Education Programme fall within the provisions of section 230 of the *Education Act*. Under the provisions of section 230(2), the instructors as teachers are required to have contracts of employment which must be deemed to include the terms and conditions contained in the form of contract described for a permanent teacher in Regulation 277. A similar issue arose in *Ontario Teachers' Federation v.*

*Metropolitan Separate School Board, supra*, where the Ontario Court of Appeal held that the operation of a similar deeming provision in the predecessor section in the *School Administration Act* was sufficient to satisfy a similar requirement in the definition of “teacher” in the *Teaching Profession Act*. Having regard to the reasoning of the majority of the Court of Appeal in that case, we are satisfied that a teacher without an existing contract of employment in the form of contract prescribed in section 230(2) may nonetheless satisfy the requirement of section 1(m) of Bill 100 in that he or she is deemed by section 230(2) of the *Education Act* to have such a contract of employment as a teacher. In our view, it is not open to the respondent to assign a teacher, who is legally qualified to teach in an elementary or secondary school, to a classification within the teaching programme of the respondent not provided for by the relevant statute or regulations and to agree not to enter into a permanent teacher’s contract, to use the language of the majority of the Court of Appeal in the above case. It was the duty of the respondent to enter into the prescribed contract and by the operation of section 230(2) of the *Education Act*, such a contract is deemed to exist. The absence of the necessary regulation with respect to a statutory provision does not render the statutory provision nugatory. See *Carling Export Brew & Malt Co. v. The King* [1931] 2 D.L.R. 545. Moreover, there is nothing in the *Education Act* or the Regulations thereunder which specifically prevents a teacher from working for one board during the day and for another board during the evening.

23. Counsel referred to previous decisions of the Board with regard to whether the instructors are to be considered as teachers for the purposes of Bill 100. In the *Board of Education for the City of Windsor, supra*, the Board decided that programmes which do not form part of the regular school year are not school programmes or schools within the meaning of section 1(1) of Bill 100 and, therefore, a concerted decision by teachers to interfere with the operations of these programmes by refraining from offering their services in respect to these programmes is not a strike within the meaning of that Act. In that decision the Board stated that Bill 100 ought to be restricted to “relations between teachers and school boards during the course of the regular school year (defined by the *Education Act*)”. In our view, these remarks must be regarded as *obiter dicta*, in that such an indication by that Board was not necessary for its decision on the facts before the Board. In addition, there is no indication in that decision that the issue which is present in the instant case was raised and argued before that panel of the Board. In the *Ottawa Board of Education*, [1983] OLRB Rep. May 694, the Board entertained an application under Bill 100 and the *Labour Relations Act* for a declaration of an unlawful strike. In that case “pink letters” were issued by two branch affiliates to discourage teachers from applying for teaching positions in night school or summer school. In dismissing the application of the Ottawa Board of Education, this Board gave as one of its reasons the fact that the concerted refusal to work was not in respect of a school programme or school as contemplated by the definition of strike in section 1(l) of Bill 100. The Board in that case, however, did not endorse the view of the Board in *Board of Education for the City of Windsor* that Bill 100 applied only to the relations between the parties during the school year. The unreported board of arbitration decision in 1983 in *Board of Education for the Borough of York* adopted the reasoning in the *Board of Education for the City of Windsor*. In that case, the majority of the board of arbitration interpreted the *Board of Education for the City of Windsor* as suggesting a distinction between those programmes that are normal or mandatory for a school board and those that are non-mandatory and unusual activities. According to the majority, the non-mandatory and unusual activities were to be considered as falling outside the scope of Bill 100. The majority also concluded that because the programme at the residential school in question was a non-mandatory and unusual activity,

the teachers employed in carrying out that programme were outside the scope of Bill 100. The earlier decisions of this Board which have been referred to have apparently never had the benefit of extensive argument on the coverage of Bill 100 in the context of an application for certification. These earlier decisions and the decision of the majority of the board of arbitration in the *Board of Education for the Borough of York, supra*, in our view, have adopted a narrow interpretation of the provisions of Bill 100 and have focussed upon the traditional aspects of the relationship between the school boards and teachers. The language of Bill 100 extends beyond the confines of such a relationship.

24. In our opinion, there is no express language in Bill 100 which indicates an intention by the Legislature to restrict its coverage to either teachers employed during a regular school year or teachers employed in mandatory or usual activities. Bill 100 is cast broadly enough in its terms to embrace various types of teaching arrangements which may exist between the applicant and the respondent. In our opinion, the correct approach to the interpretation of the scope of Bill 100 has been adopted by the Board in *Board of Education for the Borough of Etobicoke*, [1977] OLRB Rep. July 415. In that case, at page 422 of that decision the Board stated:

We find, therefore, that the phrase "as a teacher" in the section 1(m) definition of teacher contained in [Bill 100] describes the type of work performed by the teacher rather than the type of contract. We interpret "as a teacher" broadly and find that it includes those duties that fall within a broadly-defined teaching programme. The section 1(m) definition, therefore, contains three criteria: proper qualifications, the proper form of contract and the performance of duties within the teaching programme.

The approach taken in *Board of Education for the Borough of Etobicoke, supra*, differs from the narrow interpretation of Bill 100 adopted in the other decisions referred to by the Board. In our view, this is the correct interpretation of the extent of the coverage of Bill 100.

25. Over the years the applicant and its affiliates on the one hand, and various board of education on the other hand, have not adopted a consistent approach towards the extent and scope of coverage of Bill 100. It was also clear from the material filed with the Board that there has been a considerable divergence of opinion as to the extent of the coverage of Bill 100. Be that as it may, it is only recently that the extent of the coverage of Bill 100 has been argued before this Board in a series of applications for certification. Having regard to the arguments addressed to the Board and to the reasons set forth in this decision, we find that the persons who are affected by this application are teachers as defined in Bill 100 or to give it its full title, a *School Boards and Teachers Collective Negotiations Act* and, therefore, by virtue of section 2(f) of the *Labour Relations Act*, the latter Act does not apply to them. This application for certification is therefore dismissed.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. I have had the opportunity to read the decision of my colleagues and I am unable to agree with their conclusions on the first aspect of this case. I will not comment on the second aspect, because if my colleagues are wrong in their reasoning, then that issue will have to be dealt with by this panel.

2. There are conflicting decisions by this Board and conflicting decisions by Arbitrators



with respect to the definition of “teacher” as found in the *Education Act* and the *School Boards and Teachers Collective Negotiations Act* (“Bill 100”). It all boils down to what method of statutory interpretation is to be used to solve the problem.

3. Until 1984 the issues in this case were not in doubt. There were decisions of an Arbitrator and of this Board whose reasoning could lead one only to conclude that night school teachers were caught within the ambit of the *Labour Relations Act*. Prior to 1984 there were three Board decisions and one arbitration decision (by Mr. R. Kennedy) that conflicted with the reasoning in the arbitration decision of Mr. D.D. Carter in a matter involving these same parties. Until that arbitration proceeding the parties themselves had for many years considered night school teachers to be outside the purview of Bill 100.

4. I have read the decision of Mr. Carter in that award. Quite apart from being *obiter* his additional remarks use the “cart before the horse” line of reasoning. Because of the nature of the issue Mr. Carter is forced to define what he considers to be the cart and what is the horse. If he is wrong in that definition, if his “horse” has wheels and his “cart” has legs, then the whole line of reasoning fails. I think that his remarks, on a point that he did not have to decide, are wrong both in definition and result.

5. It is very important to define the issue that is before us. To my mind, the question is not simply whether certain persons are teachers as defined in the *Education Act*, but whether our Legislature truly intended to exempt those persons from the *Labour Relations Act*, the law of general application governing labour relations in our Province.

6. The process of examining the content, the practical effect and the practical history of a statute in order to discern the intent of the Legislature seems to have gone out of fashion lately. That may well be the end result when an administrative agency begins to treat its own governing statute as being entirely discretionary. When the Legislature, in what is a declaration of trust in a non-elected body, gave this Board wide discretionary powers in certain areas covered by the *Labour Relations Act*, it did not intend that we, as an administrative agency, should seek to govern labour relations in this province as we deem best. That observation is even more cogent with respect to Bill 100, an enactment which is a deliberate attempt by the Legislature to codify the rules governing labour relations in the teaching field. The way is not open to us, as an administrative agency, to regulate that field in the manner which we deem best serves the labour relations between Boards of Education and “teachers”.

7. Bill 100 and the regulations thereto prescribe a form of statutory contract for each teacher governed by that Act. From even a cursory reading of that form it is obvious that the contract was never intended to apply to night school teachers and the Applicant concedes that fact. The provisions dealing with the term of the agreement and the payment of wages have made no sense when applied to night school teachers who work only three months at a time. It could be said that the Legislature inadvertently neglected to provide a form of contract which would apply to night school teachers. But if the Legislature intended that night school teachers be bound to a statutory form of contract, the absence of such a contract form is not mere inadvertence, it is simply beyond comprehension. The only logical and reasonable inference is that the Legislature intended night school teachers to be governed by the *Labour Relations Act*.

8. Assuming that my colleagues are correct and night school teachers are now obligated

to sign the statutory contract in its present form, then an interesting wrinkle appears. The statutory form stipulates that a teacher may be bound to only one statutory contract at a time. It is not disputed that the Ottawa Board of Education employs, as night school teachers, persons who are already under statutory contract with the Carleton Board. It is clear that these persons may not legally sign a statutory contract with the Ottawa Board. Can it reasonably be said that the Legislature intended to prevent teachers of the Carleton Board from taking night school positions with the Ottawa Board? In the Toronto area, is a teacher under statutory contract with the Toronto Board of Education prevented from teaching night school credit courses in Scarborough, Etobicoke, York, North York or East York?

9. The Ottawa Board of Education has offered night school courses since 1946 and up until Mr. Carter's decision it was never suggested that the night school teachers were subject to a form of statutory contract and that the Applicant was their designated bargaining agent. Until now this Board has held that summer school teachers were subject to the provisions of the *Labour Relations Act*. From the material filed with at the hearing it is clear that the parties (and the Ministry of Education) have, until 1984, always considered the summer schools and night schools to be part of a "Third System" of education described as the Continuing Education System.

10. A copy of the Mathews Report was filed. At page 48 of that report it is clear that the teacher federations were claiming a new jurisdiction over the teachers in the Continuing Education programs. The Applicant was requesting a Legislative change so that it would have the statutory authority that it now claims before us. Not getting the Legislative enactment requested, the Applicant now seeks to read the necessary authority into Bill 100 before us. It is interesting that the Mathews commission recommended that the Legislative changes should be made (Recommendation 16), but that the Legislature declined to follow the recommendation. When one reads the comments on community of interest at page 47 & 48 of the report, it is not difficult to understand why.

11. More than a little time was spent in argument on a detailed examination and correlation of the provisions of the various relevant statutes and regulations. We learned that a person teaching a non-credit course in night school does not have to be a "qualified teacher" under the *Education Act*. We also learned that there is nary a reference to statutory contracts for night school teachers in the applicable regulations. That omission is also very telling with respect to Legislative intent.

12. When one examines all the material that was left with us, a pattern of school "systems" becomes clear. There is a "regular day-school system" that is intensely regulated and is mandatory upon each and every school board. Then there is the "continuing education system", which is not mandatory (and, as described earlier, is referred to by the Ministry of Education as the "The Third System"). There is the clear intent to differentiate between the two in all the relevant Legislation. And everything fits together in the end. It is clearly evident that statutory contracts were never intended to apply to teachers outside the "regular day-school system".

13. My colleagues have granted a monopoly to the Applicant over all night school teachers in this province (and by implication - all summer school teachers). Our new Charter of Rights guarantees freedom of association to all employees. It seems to me that legislation must now be construed to protect the freedom of association, including the right to choose

the union of your choice, rather than take it away. It must be self-evident that night school teachers are governed by Bill 100 before we should say the *Labour Relations Act* does not apply.

14. For all the above reasons, I would hold that it is clear that the teachers in question are still subject to the provisions of the *Labour Relations Act* and are entitled to the union of their choice. This application should proceed on its merits.

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**3335-84-U Russell Overland**, Complainant, v. Canadian Union of Public Employees, Local 67, Respondent, v. The Corporation of The City of Sault Ste. Marie, Intervener

**Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Unfair representation complainant not appearing at hearing - Whether costs of proceeding awarded - Whether payment of cost made precondition for filing subsequent complaint - Board practice with regard to costs reviewed**

**BEFORE:** *S. A. Tacon*, Vice-Chairman.

**APPEARANCES:** No one appearing for the complainant; *Ron Moreau, John Sloan, Eric Merisalo* and *Edmond Schultz* for the respondent; *C. R. Bernardi* and *L. A. Bottos* for the intervener.

**DECISION OF THE BOARD;** June 7, 1985

1. This is a complaint filed pursuant to section 89 of the *Labour Relations Act* alleging violation of section 68 of the Act.

2. The complainant did not appear at the time scheduled for commencement of the hearing. Accordingly, the Board waited its usual period before commencing the hearing.

3. The Board hereby adds to the style of cause “The Corporation of the City of Sault Ste. Marie” as intervener to these proceedings.

4. The Board made the following oral ruling and hereby confirms that ruling:

In a complaint alleging violation of section 68 of the Act, the complainant bears the onus of leading evidence to substantiate those allegations. Since no evidence has been adduced before the Board, the Board hereby dismisses the complaint.

5. Counsel for the intervener submitted that the Board should award costs on the ground that the complainant did not even appear at the hearing. Specifically counsel requested that costs be fixed at the discretion of the Board and that those costs be required to be paid



before the complainant would be permitted to file a similar complaint in future. The representative of the respondent neither made submissions nor raised objections to the motion.

6. At the hearing, the Board explained the Board's general policy with respect to the awarding of costs. The Board, however, reserved its ruling on the motion.

7. The Board has again reviewed its practice of not awarding costs in Board proceedings. It is appropriate to reiterate the rationale for that practice; the following passage from *Repac Construction & Materials Ltd.*, [1976] OLRB Rep. Oct. 610:

The underlying purpose of the *Labour Relations Act*, as set out in its preamble, is to further harmonious relations between employers and employees through the collective bargaining process. The purpose is not well served by a procedure that usually requires the identification of a winner and loser. The application of such a procedure, moreover, would be time-consuming, distracting the Board from its primary task of facilitating collective bargaining. The awarding of costs, therefore, should not be extended beyond the situation where a party is being compensated for the expenses that would result from an adjournment to convenience another party. To extend this procedure any further would introduce an unnecessarily punitive element into the Board's procedures.

The Board did award costs of proceeding before the Board in *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, in conjunction with other orders directing compensation to rectify an unfair labour practice. In *Radio Shack*, [1979] OLRB Rep. Dec. 1220, upheld 80 CLLC 14,017 (Ont. Div. Ct.), however, the Board declined to award legal costs, despite numerous breaches of the Act by the employer and in the context of extensive remedial orders. As the Board stated,

We have decided against awarding the complainants legal costs in this matter. The Board is hesitant to pursue this line of compensation because of the possibility that the denial of legal costs to those parties who successfully defend against complaints may be misunderstood and perceived as unfair. This policy may be reviewed by the Board from time to time.

The approach enunciated in *Radio Shack*, *supra*, has been preferred in subsequent Board decisions. See also *Grey Owen Sound Health Unit*, [1980] OLRB Rep. Feb. 223; *Comstock Funeral Home Ltd.*, [1981] OLRB Rep. Dec. 1755; *The New Gregory House Inc.*, [1980] OLRB Rep. June 873; *Avon Sportswear*, [1981] OLRB Rep. Nov. 1542.

8. The Board recognizes that parties may well be put to not inconsiderable expense in defending against complaints which are not upheld by the Board. The Board also recognizes that that sense of frustration is increased when the complaint is not just regarded as frivolous by the other parties, but where the complainant failed even to appear at the hearing. The Board agrees that the rationale for not identifying "winners and losers" is less compelling where the complainant fails to attend a scheduled hearing than where the complainant has his "day in court" and loses. However, the Board is not persuaded to depart from the Board practice and declines to award costs or set a figure to be paid before the complainant would be permitted to file a similar complaint. The Board is concerned with the impact of such an award where a complainant either fails to appear for legitimate reasons or seeks subsequently to file what would be considered a meritorious complaint.

9. In this case, the Board would comment that the respondent and the intervener expressed concern that the complainant would simply seek to relitigate the issue and/or file

further frivolous complaints. The Board notes that the substance of the instant complaint dealt with the alleged improper abandonment, in January, 1981, of a grievance filed on behalf of the complainant in July, 1980. Indeed, the intervener had, in its formal intervention, requested dismissal of the complaint on the grounds of delay; that request was not dealt with at the hearing as the complainant did not attend. In declining to award costs in this complaint, the Board is in no way condoning the complainant's failure to appear at the hearing. It is not just the parties who have incurred costs in these proceedings; the Board and the public have also been put to significant expense in convening a hearing in Sault Ste. Marie, where the complainant resides, only to have the complainant not even attend that hearing. The Board, however, considers that the Board's control over its practice and procedure [section 102(13) of the Act] and its authority to dismiss a complaint without a hearing [Rule 71] are sufficient to prevent abuse of the Board's processes should the spectre feared by the respondent and intervener actually arise. (See also: *Amalgamated Clothing & Textile Workers Union Local 1414J*, [1983] OLRB Rep. Dec. 1947; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320.)

10. For the foregoing reasons, then, this complaint is dismissed but without costs.
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**0193-85-U; 3043-84-U** Service Employees International Union, Local 183, A.F.L.-C.I.O.-C.L.C., Complainant, v. Daynes Health Care Ltd. carrying on business as Riverview Manor and Omni Health Care Ltd., Respondent; Service Employees International Union, Local 183, Complainant, v. **Riverview Manor**, operated by Daynes Health Care Ltd., Respondent

Damages - Remedies - Employer ignoring Board finding of sale - Board directing reinstatement and back wages - Persons refusing offer of reinstatement entitled to back wages where damages award not expressly made conditional upon actual acceptance of reinstatement

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

**APPEARANCES:** *Naomi Duguid* and *Carolyn Shaughnessy* for the complainant; *Peter M. Whalen* and *Earl Daynes* for the respondents.

**DECISION OF VICE-CHAIRMAN, M. G. MITCHNICK AND BOARD MEMBER B. L. ARMSTRONG; July 15, 1985**

#### INTERIM DECISION

1. This matter has had a long history before the Board. It does, however, appear to be approaching the point where the issues separating the parties can finally be resolved.

2. The protracted litigation arises out of a decision of the Board, [1983] OLRB Rep. Sept. 1564, wherein it was found that the respondent Daynes Health Care Limited (now operating as Omni Health Care Limited) had purchased the "business" of the Balmoral Nursing Home in Peterborough, and accordingly continued to be bound by the obligations attaching to the complainant's collective agreement. The respondent refused to accept the correctness of that decision, and, as was its right, sought vindication of its position in the Courts. In the meantime, however, it submitted the individuals whom the Board found had immediate employment rights under the collective agreement to the hardship of remaining unemployed by the Daynes facility, and itself to the risk of substantial damages should its legal position ultimately prove to be wrong.

3. On February 5, 1985, the Divisional Court of Ontario did in fact uphold the initial decision of the Board (see *Riverview Manor v. OLRB et al*) and the application for judicial review was dismissed. Faced with that, and the March 5, 1985 decision of the Board in Board File No. 2053-83-U, ordering it to:

"(1) forthwith offer to re-instate in active employment the former employees of Balmoral Lodge in accordance with the wage rate set out in paragraph (2) and with the seniority list filed by the parties with the Board, without loss of either seniority or service credit from the time of their lay-off; and

(2) forthwith compensate such employees in damages for all loss of wages and benefits as a result of their wrongful lay-off, including interest in accordance with Board Practice Note



No. 13, on the basis of a wage rate of 50 cents per hour above the rates in effect under the collective agreement on June 30, 1983'',

the respondent set itself to the task of re-aligning its staff-complement in the Nursing Home, so as to grant employment on a priority basis to all those persons on the Balmoral seniority list still wishing to be employed by the respondent. That offer, however, came 18 months after the Balmoral employees were first refused employment by the respondent, and only 13 of the original 33 on the seniority list have made the election to return to employment with the Home. Those 13 have now been re-instated in the Home, and are in receipt of or are about to receive the damages they have suffered for loss of income in the 18-month intervening period. The respondent has balked, however, at paying damages to those persons who have elected not to return to work, and that is the issue presently for consideration by the Board.

4. The offer of re-instatement was put to the employees by registered letter in the following form:

March 12, 1985

Dear

In accordance with the Ontario Labor Relations Board decision of March 7, 1985, with regard to the employees of Balmoral Lodge Limited and in compliance with The Collective Agreement, Article 13.04, Subsection (i), we are hereby notifying you of recall.

Please advise this office no later than 1630 hrs., Tuesday, March 19, 1985, of your intention to return to work. Notification of your intention will be received at this office, 748-6706, weekdays from 0900 to 1630 hrs.

The position you are being recalled to is *HCA*, at *full-time* status. The date for commencement is April 3, 1985, at 0900 Hours for orientation.

Sincerely,

Mrs. Audrey Richards  
ADMINISTRATOR

The responses from the Balmoral employees fell into one of four categories:

- (1) persons who notified the respondent of their acceptance by the cut-off date and actually reported for work;
- (2) persons who notified the respondent of their acceptance by the cut-off date and then failed to appear on their scheduled start-date (whereupon the respondent issued letters of termination);
- (3) persons who notified the respondent by the cut-off date that they would not be returning to employment with the Home; and
- (4) persons who did not respond at all.

5. Initially the respondent suggested that it was those who did not bother to respond

at all that should be taken to have abandoned all claims against the respondent; by the end of the hearing, however, it became apparent that the respondent's position is that only those persons who actually returned to work have demonstrated their entitlement to damages. With respect to all of the others, the respondent argues that their failure to reply or to return to work by April 3rd raises an inference that they may have ceased to be interested or available for work at some point earlier, and that they should have to come forward and satisfy the respondent that that is not the case. No authority was put forward by the respondent for its position.

6. The order of the Board in its March 5, 1985, decision was clear, and in standard form, calling for the respondent to:

(1) offer to re-instate the employees of Balmoral improperly on lay-off, and

(2) pay them for any "damages" suffered to that point.

The term "damages" incorporates the notion of deduction from the respondent's liability all amounts earned elsewhere in employment during this period, and both parties agree that a positive obligation exists on the Balmoral employees to use reasonable efforts to "mitigate" their losses in that way. The respondent concedes, therefore, that no inference would properly flow from the mere fact of an employee obtaining employment elsewhere, in the absence of some other indication that the employee had decided to do that on a permanent basis. The Board in its March 5th decision explicitly stated what was implicit from the initial finding of a "sale" under the statute, that the former Balmoral staff became employees of Daynes Health Care Limited with rights to immediate employment at Riverview, until such time as they themselves elected to terminate that employment relationship. And the respondent in taking the position that it does is not able to point to a single concrete *indiciu*m of an act of quitting prior to the election being put to these employees on March 12th. Until that point, nothing had happened in their employment relationship with the respondent to cause them to *make* such an election. (Compare, e.g. *Wilco Canada Inc.*, [1983] OLRB Rep. June 989.)

7. One of the more recent arbitration decisions dealing with an issue of this type, *Firestone Canada*, (1981) 29 L.A.C. (2d) 192 (Brunner), was filed with us by the complainant. There the employee had been granted re-instatement and damages in the usual form by an award of a board of arbitration. The employee returned to work, but severed his employment almost immediately, and the employer argued that the employee had forfeited his right to the back-pay award of damages. The new arbitration panel analyzed the case on the basis of the employee not having returned to work, and unanimously concluded:

"We can discern no legal principle or policy consideration which would or should make us hold that an employee in these circumstances is not entitled to have the benefit of an award in so far as it orders payment of damages. Indeed an examination of the authorities, such as they are, uniformly shows that these two types of relief, unless expressly so made, are not interdependent or conditional upon one another and there is no reason either in principle or in authority why an employee cannot, if he so desires, give up one and yet claim the other. This is expressly what was said in *Re Consumer's Gas Co. and Int'l Chemical Workers' Union, Local 161* (1974), 6 L.A.C. (2d) 61 (Weatherill); *Re Capital Wire Cloth Ltd. and Int'l Assoc. of Machinists, Lodge 412* (1975), 10 L.A.C. (2d) 151 (Abbott); *Re Cooper Tool Group Ltd. and U.S.W., Local 6497*, *supra*, and *Re Dominion Stores Ltd. and Retail, Wholesale & Department Store Union, Local 414*, July 4, 1978 (Kennedy) [unreported]."

The board then went on to note:

“With his usual candour Mr. Morley in his dissent in *Re Cooper Tool Group Ltd.*, *supra*, said this at p. 374: ‘I must acknowledge that I have not been able to find any support for my position in arbitration precedent.’”

8. In sum, therefore, we find that an award of “back-pay”, unless made expressly conditional upon actual *acceptance* of an offer of re-instatement, is not conditional upon the latter. Were it otherwise, the employer who “holds out” the longest in unlawfully refusing to offer re-instatement to employees laid off or fired improperly would stand the best chance of never having to pay any damages at all, as employees gradually lose interest in returning, or find a more reliable source of employment elsewhere. Any employer in the present situation is, of course, within its rights to choose to continue the litigation by putting individual employees to the proof of their damages. If it does so, however, it has to recognize that no onus exists on an employee to prove that he or she has *not* quit prior to the time the offer of re-instatement was made and declined, in the absence of some concrete indication of that to the employer prior to the offer being made.

#### CONCURRING OPINION OF W. H. WIGHTMAN;

Notwithstanding my dissent from the majority in the original decision wherein the Board found that the sale of a business had taken place, that decision having been made I am obliged now to look at the case at hand in its own merits and in so doing I find myself in full agreement with my colleagues.

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**0497-85-R** United Food and Commercial Workers International Union Local 175, Applicant, v. **Robin Hood Multifoods Inc.**, Respondent

**Bargaining Unit - Certification - Practice and Procedure - Appropriate unit settled - No dispute that union has support in excess of 55% - Dispute as to employee status determinable later under s.106(2) - Board having jurisdiction to issue final certificate in circumstances**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *R. J. Gallivan* and *R. Wilson*.

#### DECISION OF THE BOARD; July 29, 1985

1. The parties met with a Labour Relations Officer on the date set for hearing of this certification application. They agreed on a bargaining unit description. They agreed that 29 of the respondent's employees were in that unit on the application date. The applicant claimed five others were also in the unit on that date; the respondent claimed those five exercised managerial functions, and so would be excluded from the unit by reason of section 1(3)(b) of the *Labour Relations Act* (“the Act”). The Officer then advised the parties that, upon considering all of the possible results of their dispute over whether any of those five persons



was an employee in the bargaining unit on which they had agreed, the membership evidence the applicant had filed was sufficient in every case to establish that more than fifty-five per cent of the employees in the unit were members of the applicant at the relevant time.

2. The parties concluded that in these circumstances the Board would grant the applicant interim certification for the unit on which they had agreed and appoint a Labour Relations Officer to inquire into the duties and responsibilities of the five individuals in dispute. With that expectation, the parties asked the Labour Relations Officer to note in his report their joint request that the application and officer's inquiry be adjourned *sine die* so that they could attempt to settle their dispute over the status of the five persons in question during negotiation of their first collective agreement. They then executed a consent to the Board's issuing a decision in this matter based on the submissions made and agreements reached before the Labour Relations Officer, without a hearing before a panel of the Board.

3. In our decision dated July 9, 1985, we found that the unit on which the parties had agreed, namely,

all employees of the respondent at its Glassgoods Division, carrying on business as Bicks, in the Town of Dunnville, save and except line foremen, persons above the rank of line foreman, office and sales staff, and seasonal employees

constituted a unit of employees of the respondent appropriate for collective bargaining. We also found, as the Labour Relations Officer had told the parties, that:

7. Regardless of the outcome of a dispute over whether any of the disputed individuals was an employee in the bargaining unit at the time the application was made, on the basis of the membership evidence filed by the applicant we are satisfied that more than fifty-five per cent of employees in the bargaining unit at the time the application was made were members of the applicant trade union on June 7, 1985, the terminal date fixed for this application and the date which the Board determines, pursuant to section 103(2)(j) of the Act, to be the time for ascertaining membership in accordance with subsection 7(1) of that Act.

4. We were not satisfied that the decision anticipated by the parties was appropriate, for reasons set out in paragraph 10 of our decision of July 9, 1985:

10. Our concern is whether this is not a proper case in which to issue a final certificate in which the bargaining unit is defined in the manner in which the parties have agreed, and leave it to the parties to bring their dispute about the status of the five named individuals back before the Board under subsection 106(2) if they find they are unable to resolve that dispute in the course of collective bargaining. This is not a case in which the description of an appropriate bargaining unit is in any way contingent on the outcome of the parties' dispute over the identity of the individuals who fell within the appropriate bargaining unit on the application date. If the individuals in dispute exercise managerial functions within the meaning of section 1(3)(b) of the Act, then they are excluded from any bargaining unit which we might describe by operation of law. The question of the status of the individuals in question would be no more or less in dispute if we granted a final certificate in these circumstances than if we merely granted interim certification. The ability of the parties to have that issue determined by the Board if they found themselves unable to resolve it would be substantially the same whether we granted a final certificate or interim certification. The differences between the two are only consequential and collateral. One consequence of doing as the parties ask is that the Board would be left with an application which the parties are unwilling to have it process further, but which could not be terminated because the possibility of a certification application being

terminated without the granting of a final certificate is entirely inconsistent with the exercise of discretion to grant an interim certification. The other consequence is that if the applicant failed to make a collective agreement, the affected employees would be unable ever to bring a termination application, as the one-year period referred to in subsection 57(1) of the Act does not commence running until a final certificate is issued: *Comstock Funeral Home Ltd.*, [1982] OLRB Rep. Oct. 1436.

We recognized that, apart from the joint request that the inquiry into the duties and responsibilities of the disputed individuals be adjourned immediately upon being directed, the circumstances of this case were similar to those of other cases in which the Board had taken the approach which the parties anticipated here. We were concerned whether this practice reflected an unarticulated conclusion that the Board was without jurisdiction to issue a final certificate in these circumstances. Accordingly, in the concluding paragraph of our decision of July 9, 1985, we invited the parties' written submissions on the existence of that jurisdiction and on the proposed exercise of it in this case.

5. The applicant responded that it had no submissions to make on either question. In its response, the respondent agreed to the issuance of a final certificate, but made no submissions on the question of the Board's jurisdiction to do so.

6. A certification application involves a sequence of questions which always includes these:

What is the unit of employees of the respondent appropriate for collective bargaining?

What persons were employed by the respondent in that unit on the application date?

What percentage of those persons were members of the applicant at a particular point in time (ordinarily the terminal date)?

Is that percentage sufficient to entitle the applicant to a representation vote or permit certification without a vote?

Obviously, an answer to any of these questions requires that each of the preceding questions be answered first.

7. Section 6 of the Act speaks to the appropriate bargaining unit. Subsection (1) provides:

Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

The bargaining unit is an abstraction, a generic description of an employee group, the composition of which is defined in terms of the inclusion or exclusion of employees according to the nature of the work each performs. The bargaining unit is defined without reference to the identity of any particular employee. Bargaining rights are not restricted to persons employed

at the time those rights are acquired; at any given time bargaining rights will extend to all persons then employed at jobs which fall within the scope of the bargaining unit description.

8. A question of bargaining unit composition is concerned with identifying the sorts of employees who will be included in or excluded from the unit, and not with determining which persons are employees of the included sort at a given time. The latter question is addressed by section 7 of the Act:

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

Read literally and in isolation from the balance of the section, subsection (1) might be interpreted to require that the Board determine the precise number of persons in the unit on the application date and the precise number of those persons who were members of the applicant at the relevant time. However, the purpose of the directions in subsection (1) is made clear by subsections (2) and (3): the object is to determine only whether the number of members among bargaining unit employees exceeds one or other of the relevant percentages. From that perspective, it is apparent that a literal interpretation of subsection (1) could require the Board to determine questions of fact which are of no consequence to the outcome of the application, as where the only outstanding question is whether the number of members among twenty bargaining unit employees was ten or eleven at the relevant time. It should not be supposed that the Legislature intended that the final disposition of certification applications be delayed by litigation of issues whose resolution could in no event affect that disposition in any way. In our view, the obligation imposed on the Board by subsection 7(1) is discharged when the Board can say with certainty either that the percentage of members among bargaining unit employees is more than 55 per cent or that it is not less than 45 per cent and not more than 55 per cent. But for the provisions of subsection 6(2), however, the Board cannot resolve the questions posed by section 7 without first settling on a description of the appropriate bargaining unit.

9. Subsection 6(2) of the Act provides:

Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

It is important to note that this provision appears in section 6, which deals in the abstract with identification of the sort of employees who will be included in a bargaining unit, rather than in section 7, which deals with the identity and numbers of persons employed in a unit at a particular time. Subsection 6(2) is an exception to the requirement of subsection 6(1) that the definition of the appropriate bargaining unit be fully settled before an applicant can be given the right to act as exclusive bargaining agent for any employees of the respondent. A "dispute as to the composition of the bargaining unit", as those words are used in subsection 6(2), is a dispute over bargaining unit definition or description, a dispute over the sorts of



employees who will fall within the bargaining unit, not a dispute over whether any particular individual is an employee of the requisite sort, nor a dispute whether a particular individual is an employee at all.

10. Subsections 1(3)(b) and 106(2) of the Act provide:

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

\* \* \*

106.-(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

As a person who exercises managerial functions is not an “employee” as that term is used in the Act, there can be no question whether such a person is the sort of employee who should be included in or excluded from the “unit of employees that is appropriate for collective bargaining.” The kind of question contemplated by subsection 106(2) is not, strictly speaking, a “dispute as to the composition of the bargaining unit.” Such a question can affect “the number of employees in the bargaining unit at the time the application was made” but, like any other “numbers” question, need not be dealt with in a certification application if its answer would in no event affect the result.

11. We are satisfied that where, as here, the description of the appropriate bargaining unit has been settled and the Board can say with certainty that more than 55 per cent of the employees in that unit on the application date were members of the applicant at the relevant time, the Board does have the jurisdiction to grant the applicant a final certificate, notwithstanding the existence of questions which could be dealt with in an application under subsection 106(2). Although the parties to this application agreed to attempt settlement of those questions before asking the Board to answer them, their agreement played no part in our conclusion on the jurisdictional question. The Board would have jurisdiction to grant a final certificate in these circumstances even if there were no such agreement.

12. There was no suggestion in this case that the bargaining unit description would be affected by a determination of the employee status of the disputed individuals. We need not deal here with the question whether and to what extent the Board must or ought to continue to resolve questions of the application of subsection 1(3)(b) in the fine tuning of a bargaining-unit description when those questions do not otherwise affect the result.

13. Having concluded that we have the jurisdiction to grant a final certificate in the circumstances of this case, we are satisfied that we should do so. Accordingly, a final certificate will issue to the applicant with respect to the bargaining unit described in paragraph 3 of this decision.

**0471-85-R Ontario Public School Teachers' Federation, Applicant, v. Scarborough Board of Education, Respondent**

**Practice and Procedure - Representation Vote - Pre-hearing application filed same day prior certification dismissed - Employer claiming abuse of Board process - Union not having appearance of sufficient support for pre-hearing vote if employer challenges to list valid - Board assuming union's position on list correct and directing pre-hearing vote - Leaving abuse of process argument and list challenges to be determined after vote**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *R. J. Gallivan* and *J. F. Kennedy*.

**DECISION OF THE BOARD;** July 4, 1985

1. This is an application for certification.
2. The respondent, in its reply, submitted that the Board should refuse to entertain this application and therefore dismiss this application, or alternatively, refuse to direct a pre-hearing vote, on the grounds that the application is an abuse of the Board's processes. The respondent bases its submission on the allegation that the applicant filed an application for certification on May 1, 1985 (Board File No. 0257-85-R) in respect of the same group of employees who are the subject of the instant application and requested leave to withdraw that application on May 24, 1985, following which, the respondent asserts, the Board dismissed that application for certification. The applicant filed the instant application on May 27, 1985, which, the respondent alleges, was prepared on the day the Board dismissed the applicant's first application and "... is identical in form and substance to application for certification File No. 0257-85-R save and except a pre-hearing vote is now requested."
4. Without commenting upon the merit of the respondent's submission, the Board is satisfied that the respondent's submission should not cause the Board to decline to conduct a pre-hearing vote. We are not persuaded that the respondent's submissions could not be adequately dealt with at a hearing following the vote, or that no useful purpose would be served by conducting the vote prior to the hearing. (See *St. Clair College of Applied Arts & Technology*, [1984] OLRB Rep. Dec. 1776.)
5. The applicant seeks to represent the occasional teachers employed by the respondent in its elementary panel, whereas the respondent submits that the appropriate bargaining unit and voting constituency should be all occasional teachers employed by the respondent. The respondent filed schedules of employees which distinguished between the applicant's and respondent's proposed units. The applicant also challenged the list of employees filed by the respondent that related to the applicant's proposed unit.
6. If the Board were to adopt the respondent's position on the voting constituency, then the applicant would not even have the appearance of the requisite level of membership support to be entitled to a pre-hearing representation vote. If the applicant's position with respect to the appropriate unit and the challenges are accepted at this stage, the applicant does have the appearance of the requisite level of membership support for it to obtain a pre-hearing vote. (The Board's determination on this point is made having regard to the amended schedules and

submissions made by respondent's counsel in its letter to the Registrar dated June 26, 1985.) At this point in the proceeding, there is no reason to define the voting constituency in the way suggested by the respondent. If the respondent's position on the bargaining unit description is ultimately accepted the application will be dismissed without the ballots being counted since the applicant would not meet the conditions set out in section 9(4) of the Act. (See *Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602.

7. Similarly, we are not ruling on the challenges to the list at this stage of the proceeding. We are assuming that the applicant's position on the challenges to the list is correct, in order to determine whether the Board may direct a pre-hearing representation vote. The rationale for proceeding in this fashion has been explained by the Board in *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989 at 990:

"The purpose of the pre-hearing vote procedure is to test the question of representation as quickly as possible after the application date. This avoids the prejudice which inevitably occurs when the conduct of a representation vote must await the determination of factual and legal issues which can only be resolved after a hearing in which each of the affected parties can participate. Often those disputed issues include the appropriate description of the bargaining unit, voter eligibility and employee status of challenged individuals. If the existence of such disputes could stand in the way of a pre-hearing vote, the procedure's efficacy would be destroyed. That is why the Legislature required only that the Board strike a voting constituency and prescribed as the vote prerequisite only that the applicant have the appearance of the requisite support within the voting constituency. (See generally *Emery Industries Limited*, [1980] OLRB Rep. March 316 at paragraphs 5, 6 and 7.) Where determination of the actual prerequisite level of support depends on a resolution of contested factual or legal issues, *the Board assesses the appearance of support on the assumption that the union's position on the matters in dispute is correct. A pre-hearing vote is normally directed if, on that assumption, the requisite appearance of support is present.* The contested issues are dealt with after the vote is held. However, the results of a pre-hearing vote are of no effect unless it is later demonstrated that not less than 35 per cent of the persons ultimately found to have been employees in the appropriate bargaining unit on the application date were members of the applicant on that date. If that demonstration depends on contested issues being later resolved in the applicant's favour, the Board will normally defer counting any ballots until it can resolve those issues which bear on the propriety of counting all, or any, of the ballots.

As access to the pre-hearing vote procedure is a function of the matters of fact and law put in issue by the parties, there is a risk that frivolous allegations and arguments may be made. The same risk exists whenever entitlement to launch and prosecute proceedings depends only on the assertion of a *prima facie* case. However a trade union which gains access to the process by asserting unfounded and frivolous allegations and arguments only does itself harm. If it cannot ultimately demonstrate that it had the requisite support, it will never know how many ballots were cast in its favour, because unless the requisites of subsection 9(4) are met, there will be no reason to unseal the ballot box. The application having been pressed past the meeting with the officer, dismissal of the application will normally carry with it a bar imposed under section 103(2)(i). If it becomes apparent to the Board that the assertions which led to the vote were frivolous when made, then the Board may take that into account in determining the length of the bar."

[emphasis added]

8. The Board also notes that both parties described the only exclusion from the bargaining unit as "persons covered by subsisting collective agreements." For the reasons set out by the Board in its decision in *Niagara South Board of Education*, [1985] OLRB Rep. Jan. 90, that description of the exclusion is imprecise. Having regard to the foregoing, the voting constituency is:



all occasional teachers employed by the respondent in its elementary panel in the City of Scarborough save and except employees in the bargaining units for which any trade union held bargaining rights on May 27, 1985.

9. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency described above were members of the applicant at the time the application was made. Therefore, the Board hereby directs that a pre-hearing representation vote be conducted among the employees in the voting constituency.

10. All employees of the respondent in the voting constituency on the 14th day of June, 1985, who have not voluntarily terminated their employment or who have not been discharged for cause between the 14th day of June, 1985 and the date the vote is taken will be eligible to vote.

11. In view of the submissions of the parties and the issues in dispute, the Board directs that each ballot cast be segregated and that the ballot box be sealed. The Board notes that the parties have agreed that the Board should conduct this vote by mailed ballot.

12. At the meeting the Labour Relations Officer convened with the parties, the applicant requested a copy of the names and addresses of the bargaining unit employees. It is not apparent from the Officers' report of the meeting what submissions, if any, the parties made, or what position the respondent was taking with respect to the applicant's request. If this matter remains an issue in dispute between the parties, the Board directs the parties to file their written submissions on that issue with the Board by delivering three copies to the Board and one copy to counsel for the opposite party not later than July 11, 1985.

13. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

14. This panel of the Board is not seized with this matter.

15. The matter is referred to the Registrar.

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**2447-84-U Walter Sladich, Complainant, v. Labourers' International Union of North America, Local 1036, Respondent**

**Duty of Fair Referral - Practice and Procedure - Scope of matters that may be raised in unfair referral complaint in dispute - Not permitted to challenge referrals in which complainant has no legal interest**

**BEFORE:** *S. A. Tacon*, Vice-Chairman.

**APPEARANCES:** *Walter Sladich* and *Leo Berlinguette* for the complainant; *S.B.D. Wahl* for the respondent.

**DECISION OF THE BOARD;** June 12, 1985

1. This is a complaint alleging violation of section 69 of the *Labour Relations Act*. This decision deals only with the preliminary matters raised at the hearing.
2. The Board hereby confirms its oral ruling deleting "Jimmie Lewis, Business Manager of Labourers' International Union of North America, Local 1036" named as a respondent, from the style of cause and as a party to these proceedings.
3. Neither the complainant nor his representative were legally trained. Moreover, while the complaint itself was filed on December 5, 1984, there was further interaction between the parties, including an exchange of correspondence which went beyond the statements in the original complaint. Consequently, the Board considered it appropriate to clarify the complainant's allegations before proceeding to hear *viva voce* testimony.
4. The complainant's allegations may be summarized as follows.

**(I) Denial of Information**

The respondent violated section 69 of the Act by refusing to provide requested information or information in a form acceptable to the complainant. Specifically:

- (i) the replies to the complainant's letters of August 21, 1984 and September 13, 1984 were not over the signature of an authorized union official or on union stationery;
- (ii) there was no reply to the complainant's letter of October 25, 1984 until the respondent's letter of March 19, 1985 and that letter did not deal with one individual (Equizi);
- (iii) On February 6, 1985, the respondent refused the complainant's request to purchase the first four sheets of the out-of-work list, then agreed to that request later that day but on February 7th again insisted the entire list be purchased [the full list, a computer print out, was approximately 22-25 sheets at that time; the precise length depends on the number of union members out of work.]

The complainant conceded he had never informed J. Lewis, Business Manager, that the "reply" to the August 29th letter did not contain sufficient information, in the complainant's view.

(II) Qualifications as Cement Finisher:

The respondent violated section 69 of the Act in not classifying the complainant as cement finisher when he requested to be so listed in March, 1984. It was agreed that the complainant's qualifications as singnalman were not relevant to the disputed referrals since signalmen, if needed on a particular job, were always selected from the labourers already on site rather than specifically requested by employers.

(III) Referrals of G. Boyer and J. Suppa:

The respondent violated section 69 of the Act in returning both individuals to the same point in the out-of-work list, rather than the bottom of the list, when the company to which they had been referred refused to hire them. It was acknowledged that the refusal to hire was currently the subject of a grievance. Further, the complainant conceded that the qualifications for the referral were those of skilled form builder/setter and that the complainant did not possess such skills. Finally, Boyer and Suppa were below the complainant on the out-of-work list when referred and were returned to that position below the complainant.

(IV) Other Referrals, particularly of Cement Finishers:

The respondent violated section 69 of the Act in referring the following individuals to jobs as cement finishers although their position on the out-of-work list was below that of the complainant. The complainant was not asserting that the listed individuals were not qualified as cement finishers but that he was also so qualified and, thus, was entitled to those referrals.

(Name)	(Referral)
R. Dilollo	Newman Bros. Construction
D. Pedalino	Samson Construction
A. Posteraro	Newman Bros. Construction
I. Turrigeu	Arneks Construction
L. Martin	Arneks Construction
M. Trunzo	Bird Construction
A. Quintinho	R. M. Elliot Construction
E. Ball	Arneks Construction

The following referrals were also challenged:



D. Tegosh	Referred as steward
J. Sayers	Ontario Hydro, EPSCA

union security provision

E. Agawa	Recalled to Bird Construction
I. Eguizi	Referred to Bird Construction

With respect to Agawa, the complainant acknowledged that the position on the out-of-work list to which Agawa was returned had no effect on the complainant's entitlement to referrals.

5. Counsel for the respondent made a number of preliminary objections in respect of the issues, as clarified at the hearing. Firstly, counsel submitted that the complainant should be restricted to the allegations in the complaint itself. Counsel argued that the complainant and his representative could not claim to be innocent of Board procedure, including the requirement for particulars, given their awareness of, if not direct involvement in, another case presently before the Board. Counsel contended that what the complainant and his representative were really seeking was the right, through section 69, to scrutinize all hiring hall referrals. This amounted to an abuse of the Board's process. Further, if the Board permitted the complainant to repeatedly expand and/or recast his allegations, counsel argued the cost of such litigation would bankrupt the respondent. Moreover, counsel stressed that the respondent had offered explanations for the referrals, explanations which the complainant simply refused to accept. Thus, counsel submitted that the complaint should be restricted to the alleged denial of information (item I). The issue of the complainant's qualifications as a cement finisher were not properly within the scope of the original complaint (item II). Item III was not properly before the Board because the complainant was not entitled to challenge referrals which had no effect on the complainant's entitlement to referral. With respect to item IV, counsel asserted those impugned referrals were also beyond the scope of the original complaint filed with the Board. With reference to one referral, Tegosh, counsel informed the Board that the issue of referrals of stewards was presently before another panel and, at least, the Board should await that decision.

6. The complainant's representative agreed that there was nothing unique about the Tegosh referral, i.e., that the issue was solely a referral of a steward. Beyond that, however, the complainant's representative opposed the positions taken by counsel for the respondent.

7. Before the interim decision in this matter was released, the Board received the following letter from the complainant's representative.

An explanation is requested as to why the Council [sic] for the respondent did not comply with the information requested under the subpoena which was served to the respondent on December 27, 1984.

This question arose during the course of the hearing held in the city on April 23, 1985. We do realize, from the March 7, 1985 correspondence that an argument was brought forward for the respondent.

However, the requested information is by no means something which the respondent does not have or is incapable of providing.

We ask that this information now be ordered to be released and provided to the complainant.

We are reviewing information which was obtained under subpoena from the employers to determine if further violations of the complainant's rights to be referred by virtue of his position on the out of work list has taken place. Once this has been completed, we shall advise the Board.

There is no fact to the March 7, 1985 statement under schedule (A) by Council [sic] for the respondent that the information requested on August 21, September 13, September 26 and October 25 (two letters) was previously provided.

We note the enclosure forwarded with your letter of March 22, 1985 given under authoritative signature as therefore, being proper and acceptable.

8. A copy of that letter was forwarded to the respondent and the following reply received:

We are in receipt of a letter dated May 2, 1985 from the Board Registrar enclosing a letter dated April 29, 1985 from the Representative of the Complainant.

As acknowledged in the said letter, the Board dealt with the adequacy of the information provided to the Complainant and/or his Representative at the hearing held on April 23, 1985. At that hearing the Representative on behalf of the Complainant acknowledged that the information obtained in the letter from our offices dated March 19, 1985 satisfied all requests for information required by the Complainant. Further, the Board stated that its decision arising from the April 23, 1985 hearing would specifically rule upon the scope of the Complaint and in particular the issue dealing with a denial of information.

Accordingly, it is our position that the letter dated April 29, 1985 from the Representative of the Complainant is highly improper and attempts to influence the Board in the course of its decision-making process by renewing a request for information stated to be satisfied at the hearing and further to be the subject matter of the Board's pending decision.

Should the Board require further explanation in this regard, do not hesitate to contact the writer.

9. The Board first intends to deal with the preliminary objections raised by counsel for the respondent and then with the above letters.

10. There is no objection that the issue of the alleged denial of information is properly before the Board. The Board recognizes that some of the elements of this allegation may not have been particularly clear (e.g., the right to purchase the first four sheets of the computer list). However, this element is part of the interaction between the parties dealing with the requested information. The Board, then, shall hear evidence relevant to item I. At this point, it is also appropriate for the Board to note that, on review, the facts agreed upon the parties were so few and so integral to points about which there was still dispute that the Board considers that hearing *viva voce* testimony is the most expeditious manner of introducing the evidence.

11. With respect to item II, the Board also considers that this matter was sufficiently raised by the date of the hearing that the Board should proceed to hear evidence as to the alleged qualifications of the complainant as a cement finisher and the alleged refusal of the respondent to recognize those qualifications. The Board's decision to hear the evidence dealing with this allegation, however, does not preclude the parties from addressing the question of the appropriate remedy, and any limitations thereon, if the allegations are substantiated.

12. The Board, though, does not regard item III as a matter which the complainant can properly challenge. The positions to which Boyer and Suppa were referred required skills as a form builder/setter; the complainant is not so qualified. Moreover, both Boyer and Suppa were below the complainant on the out-of-work list and were returned to a position below him. The referrals of these men, then, did not affect the complainant's statutory rights. The duty owed by the respondent to the complainant under section 69 of the Act is not a springboard enabling the complainant to challenge referrals except those in which he has a legal interest. The complainant may well be dissatisfied with the respondent's executive, by-laws, procedures, etc. The Board, however, is not the forum for dealing with those dissatisfactions. In short, the complainant's entitlement to be referred to positions for which he was qualified is not affected by the return of Boyer and Suppa to the positions on the out-of-work list they had occupied before the company refused to hire them. The Board, then, will not deal further with these allegations.

13. Item IV challenges a number of referrals. The Board finds that the reasoning in the preceding paragraph is applicable to the referral of Agawa. Accordingly, the Board will not deal further with that referral. With respect to the referral of Sayers, the complainant has not given sufficient particulars to indicate the basis of the challenge to the referral. The Board, then, is not prepared to hear evidence concerning this referral either. Equizi, however, was first on the out-of-work list, referred to a job and returned to the top of the list. The respondent's position is that Equizi refused the referral for health reasons. Because Equizi was returned to a position above the complainant, if the complainant does not accept the respondent's explanation, the complainant is entitled to challenge the respondent's placement of Equizi and the Board will hear evidence on this issue. The Board intends to defer consideration of the Tegosh referral until a similar issue is dealt with by another panel of the Board. At that point, the complainant may raise the matter before this panel; the appropriateness of this panel dealing with the Tegosh referral will be dealt with at that time. Finally, the Board intends to defer hearing evidence on all of the remaining referrals of cement finishers listed in item IV until the Board has decided the matters in item II. [These referrals include: Dilollo, Pedalino, Posteraro, Turrageu, Martin, Trunzo, Quintinho, Ball.] Specifically, if the Board finds no violation of the duty of fair referral in the refusal of the respondent to classify the complainant as a cement finisher, the impugned referrals are not properly before the Board, for the reasons set out earlier. Further, if the allegations in item II are upheld, the question of the appropriate remedy may well affect the Board's decision whether to hear evidence about the impugned referrals of cement finishers.

14. The Board now turns to the letter from the complainant's representative dated April 29, 1985 and that of counsel for the respondent dated May 30, 1985. With reference to the subpoena *duces tecum*, the Board points out that it indicated at the hearing that the procedure outlined in *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Apr. 659 was not appropriate in the circumstances and that the complainant could raise the issue at the appropriate point in the continuation of the hearing. Further, the Board reminds the complainant and his representative that the Board indicated at the hearing that it was not prepared to permit additional referrals (beyond those already listed and, of course, subject to the ruling on the respondent's objections) to be challenged in these proceedings. Finally, the Board would caution the complainant and his representative that the parties made their submissions on the preliminary objections at the hearing; the Board is not prepared to receive additional submissions outside the hearing unless the Board directs that written submissions are to be filed with the Board.



15. To summarize, on continuation of the hearing, the Board will proceed to hear evidence relevant to:

- (a) item I, the alleged denial of information;
- (b) item II, the alleged qualifications of the complainant as cement finisher and the alleged refusal of the respondent to acknowledge that qualification on the complainant's request so that the complainant could be referred to positions as cement finisher to which he would be entitled by virtue of his position on the out-of-work list.

16. The Board will defer consideration of item IV, as restricted to the referrals of Tegosh and those referred as cement finishers, pending the determinations noted in paragraph 13.

17. For clarity and to avoid possible confusion and delay at the next hearing date, the Board herein sets out those matters on which it will *not* hear evidence:

- (a) qualifications of the complainant other than his alleged qualification as cement finishers;
- (b) referrals of individuals other than those listed in item IV;
- (c) referrals of those listed in items III and IV, except Tegosh and those referred as cement finishers (and the Board has deferred consideration of these noted referrals). The Board further finds that the complainant has waived his right to reassert a challenge to any referrals mentioned in the correspondence between the parties which have been filed as exhibits, except those individuals listed in item IV.

18. For the record, it is appropriate to note the following undertakings by the complainant and his representative: to return any documents not introduced as evidence but given to the complainant and/or his representative by persons served with a subpoena *duces tecum*, at the conclusion of these proceedings before the Board; beyond these proceedings, not to disclose or make other use of such material; to deliver the material to the respondent so that the respondent may make a copy of such material, in the presence of the complainant and/or his representative, at the respondent's cost.

19. This matter is hereby referred to the Registrar to schedule consecutive continuation dates.

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**1657-84-R** United Electrical, Radio and Machine Workers of Canada (UE), Applicant, v. **Sylvania Lighting Services** a division of GTE Sylvania Canada Limited, Respondent, v. Group of Employees, Objectors

**Employer - Respondent engaging persons supplied by temporary help agency - Whether respondent or agency employer for purposes of Act - Board applying test of who exercises “fundamental control over working lives and working environment of those in dispute” - Finding respondent to be employer**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *W. H. Wightman* and *L. Lenkinski*.

**APPEARANCES:** *Frank Piserchia* for the applicant; *D. Churchill-Smith* and *Peter Christie* for the respondent; *John Belisle* and *Eddie Deas* for the objectors.

**DECISION OF HARRY FREEDMAN, VICE-CHAIRMAN AND BOARD MEMBER L. LENKINSKI; June 27, 1985**

1. In this application for certification, the Board, differently constituted, by decision dated October 23, 1984, appointed a Labour Relations Officer to inquire into and report to the Board on the composition of the bargaining unit and the list of employees. Pursuant to that direction, the Officer convened meetings with the parties and issued a report dated February 18, 1985, on February 11, 1985. In accordance with Form 68, Notice of Report of Labour Relations Officer, the applicant filed detailed written submissions with respect to the conclusions the Board should reach in view of the Officer's report, and stated that it did not desire a hearing before the Board. The respondent filed its submission and requested a hearing before the Board in order to permit it to make further submissions to the Board. Accordingly, pursuant to section 67(5) of the Board's Rules of Procedure, the Registrar set this matter down for hearing before the Board on May 17, 1985.

2. When the hearing of this matter convened, the Board advised the parties that there was no certificate of trade union status on file. During a recess, the applicant obtained a copy of a certificate issued to it by the Board in respect of this respondent in another certification proceeding (Board File No. 2834-84-R). The applicant filed that certificate with the Board when the hearing of this matter resumed. The parties agreed that the Board had found the applicant to be a trade union prior to the hearing before this panel of the Board and further agreed that the Board could rely on that determination in this proceeding. Having regard to the agreement of the parties and pursuant to section 105 of the *Labour Relations Act*, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.

3. The issue before the Board at this stage of the proceeding is whether certain persons who perform work for the respondent and who are nominally the employees of Manpower Services (Ontario) Limited (hereinafter referred to as Manpower) are, for purposes of the *Labour Relations Act*, employees of the respondent. The applicant asserts that the persons in dispute are the respondent's employees whereas the respondent and the group of employees submit that the persons in dispute are actually employees of Manpower.

4. The respondent is engaged in the lighting maintenance business on an on-call and

contractual basis. Its need for labour fluctuates a great deal, and for that reason, it has used temporary help agencies, such as Manpower, to supply it with labour on a temporary basis.

5. The contract between Manpower and the respondent stipulates that the persons supplied by Manpower to the respondent are employees of Manpower. Manpower is responsible for maintaining personnel and payroll records for those employees, computes their wages and withholds the necessary tax and other payroll deductions, remits the amounts withheld to the appropriate agencies and makes the necessary employer contribution to various agencies, pays the employee's wages and fringe benefits, if any, to the employees, provides for liability and fidelity insurance and pays the necessary Workers Compensation Board assessments. Pursuant to that contract, Manpower also undertakes "at the request of customer for any legal reason, [to] remove any of its employees assigned to Customer provided that this arrangement shall in no way affect the right of Manpower, in its sole discretion as employer, to hire, assign, reassign and/or terminate its own employees."

6. The employees in question are paid by Manpower on cheques issued by Manpower. The employees' wage rate is set out in Exhibit "A", schedule 1 to the contract. The contract provides in Exhibit A:

"SPECIAL CONSIDERATIONS"

After discussion with Customer, Manpower will increase local Light Cleaning Rates in order to maintain competitiveness in local market pay, no more than one increase per market per six months may be considered."

The contract further provides that Manpower's billing rate, which is based on hours worked per employee, will be increased if Manpower is required to increase the wage rates of the employees in dispute.

7. The hourly billing rate does not contemplate overtime. Where the employees in dispute work authorized overtime, that is, more than eight hours per day or 40 hours in a week, the contract requires the respondent to pay Manpower one and one-half times the hourly billing rate for the overtime hours worked by those employees.

8. The employees in dispute were referred to the respondent by Manpower. The employees were required to fill in forms and were offered jobs by Manpower. Upon being accepted by Manpower, they were referred to John Caputi, a manager employed by the respondent who is responsible for assigning the employees to work.

9. The respondent uses both its own employees and employees assigned to it by Manpower to perform the work required by its business. Their working conditions are the same and they occasionally work together. All of the employees wear uniforms supplied by the respondent, are dispatched by the same person, Mr. Caputi, and perform the same type of work. Indeed, one of the employees in dispute worked as a group leader supervising both the respondent's own employees and the employees supplied to the respondent by Manpower.

10. The employees supplied by Manpower are fully integrated into the respondent's operations. Their day to day work supervision is done by the respondent, not Manpower. The respondent has a significant degree of control over what hours those employees will work, where they will work, and indeed even if they will work for it. The respondent, in our view,



is actually responsible for the direct cost of those employees' wages since their wages are charged back to the respondent based entirely on hours worked. While the employees in dispute may be referred to other employers by Manpower, and the respondent and Manpower have in both their contract and in the way the employees are paid made it clear to the employees that the respondent and Manpower treat those employees as employees of Manpower, the Board is required to examine, not just the legal form of the arrangement, but the actual way in which the arrangement is carried out.

11. Numerous cases were cited to us in argument, including *Templet Services*, [1974] OLRB Rep. Sept. 606; *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931, *Don Mills Foundation* (1984), 14 L.A.C. (3d) 385 (P. Picher), *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538, *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645 and *K-Mart Limited*, [1983] OLRB Rep. May 649. In our view, the principal concern of this Board in determining which one of two or more persons is the employer of employees for purposes of the *Labour Relations Act* is who is the person that exercises "fundamental control over the working lives and working environment of those in dispute." (See *Sutton Place*, *supra*).

12. The respondent submitted that its arrangement with Manpower was based on very practical business considerations in order to permit it a great deal of flexibility in its use of labour. Nothing before us suggested that the arrangement was made for any purpose that would circumvent the *Labour Relations Act* or affect the rights of the employees in question under the Act. Our determination in this case must rest on our assessment of the factors that assist us in deciding which entity is the employer under the Act. While we recognize the real utility of the respondent's arrangement with Manpower whereby a pool of temporary labour is available to it, our decision should not focus on the purpose of the arrangement, but rather on what the arrangement is.

13. In this case, it is not necessary for us to review in detail all of the facts elicited by the parties. We are satisfied that the day to day control of the employees' working lives rests with the respondent, and not Manpower. The respondent decides where those employees will work, who they will work with, what work they will perform and whether they will work overtime. Manpower is primarily a payroll service for the respondent, who pays Manpower a rate calculated on the hours worked by the employees it supplies to the respondent. The respondent must also pay a premium for employees who work overtime and must also pay any increase in the wage rates that Manpower pays to those employees. Manpower does not supervise, train or evaluate the employees' performance. The employees in dispute are fully integrated into the respondent's operations. Their work responsibilities and reporting procedures are indistinguishable in all material respects from the respondent's other employees. We are therefore satisfied that the respondent is, for purposes of the *Labour Relations Act*, the employer of the persons who are supplied to it by Manpower.

14. This matter is hereby referred to the Registrar to be re-listed for hearing at the earliest possible date to deal with all outstanding issues, including the agreed-upon bargaining unit description which appears to apply to locations not originally described in the Board's Notice to Employees, the degree of membership enjoyed by the applicant among the employees in the bargaining unit and the effect, if any, of the statement of desire filed by a group of employees who are opposed to the applicant.

15. This panel of the Board is not seized with this matter.

## DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. On the basis of the report of examination by the Labour Relations Officer which contained the evidence of one of the affected individuals, John Belisle, I disagree with the finding of the majority and would instead find the sixteen persons in dispute to be employees of Manpower Temporary Services.

2. It is important to note that no attempt has been made to characterize the arrangement entered into between the Respondent and Manpower Temporary Services as anything other than a pragmatic and practical solution to the problem of fluctuating staffing needs. The Respondent employs a core group of people and supplements this group with temporary personnel in a fashion which is "not uncommon in the industry" according to evidence of the general manager, Mr. Christie. The arrangement with Manpower Temporary Services has been in place about four years but indeed from the outset of the enterprise, some ten years ago the Respondent has had similar arrangements with one or another company offering temporary help services on a similar basis.

3. This arrangement is operative not only in Toronto but, as well, in the Municipalities of London and Peterborough.

4. With references to fluctuations in staffing requirements Mr. Christie testified as follows:

"...Our industry is fairly dynamic in the sense that it is relatively young, and as such we have have highly volatile cyclical patterns in our sales development. We have seasonal patterns that have not as yet been developed to a strong point; we have cyclical patterns within three-month, four-month period of time. We hire part-time assistants ranging from one day to three months depending on the projects that we have acquired."

5. On any given day there may be as many as sixteen or as few as two temporary personnel required. The arrangement with Manpower allows for some continuity in the persons assigned and this is desirable not only from this standpoint of having "experienced" personnel available but also because it has provided the Respondent with an accessible pool of individuals to which the Respondent has turned with offers of employment to replace or add to its cadre. The evidence is that five such offers have been extended and accepted.

6. John Belisle, one of the four disputed persons who was examined submitted at our hearing that while he enjoyed being assigned by Manpower to the work at Sylvania he particularly appreciated the fact that he could refuse that assignment and still expect Manpower to offer him alternative assignments. He also recognized that assignment to work other than at Sylvania might come at the suggestion of his employer, Manpower, and indeed at least one such suggestion or invitation has been extended to him.

7. Thus the arrangement, while having clear business benefits for the Respondent company, also has its appeals to those persons who choose, for whatever reasons, to be employed by Manpower Temporary Services. This mutually beneficial arrangement results in an effective deployment of human resource skills and it seems to me should be encouraged as a matter of public policy.

8. On other occasions the Board has laconically observed that employees should not be the last to know who their employer is. This is not a case of that genre. The applicant union and some of the disputed persons may perceive it would be in their interest for the Board to find that they are employees of Sylvania but all who were examined knew from whence their pay cheques came, (Manpower) and who it is that pays, or co-pays, their fringe benefit package (again Manpower).

9. Belisle asserted unequivocally before us that he is an employee of Manpower. At that juncture it seems to me it becomes incumbent upon anyone who disagrees with Mr. Belisle's assertion to prove it. Such a case was not made out in my view.

10. The question of determining who is the employer was canvassed thoroughly in *Sutton Place Hotel* [1980] OLRB Rep. Oct. 1538, where at para. 29 of the decision the Board begins to illustrate how the indicators used for making such a determination have pointed in different directions in numerous cases. In my view, the first case cited, *Templet Services* [1974] OLRB Rep. Sept. 606, is on all fours with the case before us even to the point of involving the same entity as the provider of temporary help. The specific words quoted from para. 14 of *Templet Services*, *supra* are worthy of restatement here:

“While the immediate direction of these persons is undertaken by Mr. Hoppe, the overriding control of their work clearly resides in Manpower. In addition, there is no evidence before the Board of any intention between the respondent and the persons affected by this application to create the relationship of employer and employee. Manpower provides a service which the respondent has evidently found some occasion to use. The fact that the persons affected by this application are in close physical proximity to the respondent does not obscure the underlying nature of the relationship between them and Manpower. It is to Manpower that they work for setting the rate for the job, payment of wages, assignment to jobs, overall control and to whom they, in reality, render their services”.

11. For a thoughtful discussion of the social policy implications of decisions which may frustrate the efficient deployment of human resources in a society which, if not in transition is at least dynamic and changing, I commend the decision of Board Member, J.P. Wilson at page 972 of *Kennedy Lodge Inc.* [1984] OLRB Rep. July 931.

12. Whatever impact this decision will have on the application for certification is unknown to me but, more important, it is irrelevant to the issue before us which I consider to be of a threshold nature and of significant importance in terms of its social policy implications. For the reasons adumbrated above I would find the disputed persons to be employees of Manpower and not appropriate for inclusion for purposes of collective bargaining with persons who will have an on-going interest and relationship with the Respondent company.

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**0422-85-R The Corporation of the City of Thunder Bay, Applicant, v. Ontario Public Service Employees Union, Respondent, v. Group of Employees, Objectors**

**Crown Transfer - Practice and Procedure - Application filed more than 60 days after transfer - Whether timely - Whether Board have jurisdiction to extend time limit**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *W. H. Wightman*, and *B. L. Armstrong*.

**APPEARANCES:** *Brian A. Babcock*, *O. N. Antilla* and *J. Dolph* for the applicant; *James Thomas* and *Glen Leckie* for the respondent; *Michelle Herits* and *Gerald Zuk* for the objectors.

**DECISION OF THE BOARD (ORALLY); July 8, 1985**

1. The applicant has applied to the Ontario Labour Relations Board under section 4 of the Successor Rights (Crown Transfers) Act for termination of the bargaining rights of Ontario Public Service Employees Union, as a result of a transfer of an undertaking by her Majesty The Queen, in Right of Ontario, as represented by the Minister of Community and Social Services, to The Corporation of the City of Thunder Bay, on or about the first day of January, 1985.
2. The respondent Ontario Public Service Employees Union took the position that the application was untimely, having been brought more than 60 days after the transfer of the undertaking in question, and the Board heard the representations of the parties on that issue only.
3. It does appear that the statute on its face raises a real question of the timeliness of this application. Section 4(2) provides:

Where an undertaking is transferred from the Crown to an employer, any person, employee, organization, trade union or council of trade unions may apply to the Board ...

- (a) within 60 days after the transfer of the undertaking ...

The applicant indicates that it is that sub-section, and not subsection (b) that it relies upon in the present circumstances. While we agree with the applicant that the word "may" in sub-section 2 is permissive, in the context of the section as written it is "permissive" in the sense that any person, employer organization, trade union or council of trade unions may apply to the Board during the period specified, that is, the 60 days after the transfer. There is no provision in the Act for the bringing of such an application outside of the specified period, unless the Board can find the jurisdiction to, in effect, extend the 60-day period provided for. And it seems to us that as the time limits under consideration here are made part of the actual enabling legislation itself, our authority to modify those time limits, or grant dispensations, must be found within the statute or a comparable statute as well. It is not sufficient, in other words, to look to the Board's general rules of practice, or rules which the Board itself makes under the *Labour Relations Act*, to find the jurisdiction to effectively amend the statutory requirements. What the applicant therefore relies upon is section 103 of the *Labour Relations Act*, as indeed was relied upon by the Courts in the *Man of Aran* case, reported at [1973] 2 O.R. (2d) 54. That section is now section 114 and provides:

No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

4. In order to get to section 114 for these proceedings, the applicant relies on section 6(2) of the *Crown Transfer Act*. That section provides:

(2) Except as otherwise provided in this Act, where an undertaking is transferred from the Crown to an employer, the *Labour Relations Act* applies to a bargaining agent that has representation rights in respect of the employees employed in the undertaking and to the employees ...

The section by its term is very specific as to whom it applies. It is not made to apply to an “employer”, for example, and one might infer from that that the section appears to be directed more at the substantive protections granted to both trade unions and to employees under the *Labour Relations Act* than to broad procedural sections such as section 114. But in any event the employer is clearly omitted from the list of persons to whom the section applies. Looking at the persons who *are* mentioned, it does not appear that one can say that any trade union other than OPSEU has representation rights in respect to this undertaking at the time the Board must make its assessment, and in any event the other trade union in question, CUPE (who represents the City’s employees), is not before us in the present proceedings. We note that there are *employees* before us who are very much affected by what is at issue here, but those employees are not the applicants, and we do not think that their presence as intervenors can be used to assist the present applicant on the question of the timeliness of its own application. In the result the applicant is able to point to nothing which would provide the Board with the kind of discretion that it seeks and that the applicant must have in order for this application to be timely under the present circumstances. We note again that the present circumstances, as the applicant has submitted, would not appear to include those which give rise to a timely application under section 4(2)(b) of the Act, notice to bargain not having yet been given to the successor employer.

5. Where such a discretion or latitude is not readily apparent, we as a Board, being mindful of all of the interests that are before us, have to wonder whether we are doing a favour to those who support this application to take jurisdiction in a manner which may well be subject to being vacated in the Courts. Beyond that there is certainly a question in view of the other legal arguments the respondent seeks to make (some of which will be before the Grievance Settlement Board on July 16 and 17), together with the potential for rebuttal evidence, whether we would be able to finish this application today. And the matter being outstanding might well come in the way of an application being brought before the Board under section 4(2)(b) by the employer, as circumstances permit, where the Board’s jurisdiction would be clear, or perhaps by what has been termed the “proper” applicant (i.e., the competing trade union), in a section 5 application, the present applicant (the employer) not being one of the parties permitted by the terms of section 5 itself to bring an application under that section. Such latter application would allow the Board to consider the central issue of “intermingling” of the employees in a more direct way than is open to us in a proceeding under section 4.

6. We are, in any event, not satisfied that we have the jurisdiction to entertain the present application. This may appear to some to be a technical application of the statute, but

in all of the the circumstances before us we find that it is the one that we are compelled to, and the application is accordingly dismissed.

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**3477-84-R** Labourers International Union of North America, Local 506, Applicant, v. **The Board of Education for the City of Toronto**, Respondent, v. Operative Plasterers' and Cement Masons' International Association of United States and Canada, Local 598, Intervener

**Certification - Practice and Procedures - Prior application dismissed because of failure to file Form 9 declaration concerning membership documents - Dismissal due to technical defect - Second application not barred**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *F. W. Murray* and *B. L. Armstrong*.

**APPEARANCES:** *Chris G. Paliare*, *Tony Neil* and *Michael Michalovic* for the applicant; *Brent Dykeman*, *Nikki Dimson* and *Ron Schriber* for the respondent; *John Marchildon* and *Giovanni Balanzin* for the intervener.

#### **DECISION OF THE BOARD;** June 18, 1985

1. The Board, by decision dated April 18, 1985, directed the taking of a pre-hearing vote, and ordered that the ballot box be sealed in view of the submissions filed by the applicant and intervener.
2. The hearing in this matter was convened to deal with all the issues in dispute between the parties. Counsel for the respondent advised the Board that the respondent withdrew its objections to the application based on the applicant's undertaking relating to the pattern of bargaining between the respondent and the Building Trades Council that is set out in the applicant's letter to counsel for the respondent dated April 16, 1985, a copy of which was filed with the Board by counsel for the respondent by letter dated April 30, 1985.
3. The Board then received the intervener's submissions with respect to the intervener's request to dismiss the application on the ground that the applicant should have been barred from making the application. The respondent did not make any submissions to the Board on that issue and the Board did not find it necessary to call on counsel for the applicant. The Board, after a brief recess, delivered the following oral ruling:

#### ORAL RULING

The intervener submits that the Board should exercise its discretion under section 103(2)(i) of the *Labour Relations Act* and refuse



to entertain this application for certification because the Board dismissed an earlier application for certification filed by the applicant.

Both this application for certification and the earlier application are attempts to displace the intervener as the bargaining agent for the employees in the bargaining unit for which the intervener holds bargaining rights.

The first application for certification was dismissed by a decision of the Board (differently constituted) dated March 26, 1985, by reason of the applicant's failure to file a declaration concerning membership documents in Form 9. (See Board File No. 3260-84-R.) The Board did not direct a pre-hearing vote in that proceeding.

The Board's exercise of discretion to refuse to entertain a subsequent application has generally followed the principles set out in *Patchoque Plymouth Hawkesbury Mills, a division of Amoco Canada Petroleum Company Limited*, [1972] OLRB Rep. July 747 at page 749:

"The Board has on previous occasions imposed a bar of six months duration of an unsuccessful application for certification by a trade union. The effect of this bar is that the Board will not entertain a further application for certification with respect to any of the employees of a respondent affected by the unsuccessful application for certification for the stated period of six months.

In almost every instance where the Board has imposed such a bar, a representation vote has been directed and conducted even though the ballots may not have been counted, see, for example, *The Stanley Steel Company Limited* case, OLRB Rep. February 1972, p. 181. Where the Board has directed a representation vote and a trade union requests leave to withdraw its application for certification before the representation vote is conducted, the Board has in the past dismissed the application for certification and has not imposed a bar to further applications but has drawn the attention of the parties to the principle enunciated in the *Mathias-Ouellette* case, 56 CLLC 18,026; C.L.C. 76-485. This principle places the burden on the applicant of showing why the Board should entertain a subsequent application for certification by the same trade union with respect to any of the employees affected by the earlier unsuccessful application for certification. A third example of the type of situation where the Board has imposed a bar is to be found in the *J. W. Crooks Company* case, OLRB Rep. February 1972, p. 126, where a trade union made four unsuccessful applications for the same unit of employees in a period of a little more than three months."

The Board in the *Ontario Hospital Association (Blue Cross)* case, [1981] OLRB Rep. April 468 indicated that the Board would ordinarily impose a bar or refuse to entertain a subsequent application where the first representation application is dismissed in situations where there is an incumbent bargaining agent except in special circumstances. Those special circumstances were discussed in the *Ontario Hospital Association (Blue Cross)* case at 481:

"Finally, the cases reveal that where special circumstances cause the dismissal of an initial application the Board may be willing to entertain an immediate second application. These cases can also be seen as an attempt by the Board to balance employees wishes against stability in collective bargaining. Where an initial application

is dismissed because of 'a technical irregularity', it has been the Board's view that a second application ought to be entertained to determine effectively the real representation issue before it. Initial cases so dismissed are usually dispatched quickly and cause little adverse impact on any ongoing bargaining by the incumbent. However, just what constitutes a technical irregularity is not easily defined. The filing of 'stale-dated' cards by mistake even when 'fresh' cards pre-existed the first application has been held not to raise a special circumstance avoiding the application of section 92(2)(i) [now 103(2)(i)]. See *Windsor Lumber Co. Ltd.*, *supra*. On the other hand, the dismissal of a first application because of the impact of section 92(2)(a) on the membership support of an applicant forced to accept the application date of a competing but earlier application has been held not to prevent a second application. It was thought that any other result would be 'unfair and unduly technical'. See *Du Pont of Canada Limited*, [1967] OLRB Rep. Nov. 737. The Board has also allowed a second termination application where a first application was dismissed because an applicant did not know enough to call available evidence regarding the circulation of a petition or because a principal witness was on vacation out of the country and the necessity of his attendance was not appreciated. See also *Soo Dairies Limited*, [1971] OLRB Rep. July 439 and *Calvin W. Golbeck*, [1978] OLRB Rep. June 543. However, the cases also make it clear that where there is an ongoing bargaining relationship an application need not result in an actual representation vote to cause the Board to refuse to entertain a second application under section 92(2)(i). For example, an application for certification dismissed because the applicant could not establish itself as a trade union within the meaning of the Act has provided a basis to the invocation of section 92(2)(i). See *Filey-Hall Paper Box Co. Ltd.*, *supra*. A similar result has followed where a certification application was dismissed at a hearing because of clearly insufficient membership evidence support. See *Trinidad Leaseholds (Canada) Ltd.*, *supra*. The same end can befall a second termination application where the first is dismissed because the Board is not satisfied that at least 45% of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the incumbent trade union. See *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 791; *Continental Can Company of Canada Limited*, [1964] OLRB Rep. Dec. 459 (the second application dismissed June 25, 1964)."

See also *Browning-Ferris Industries Ltd.*, [1982] OLRB Rep. Sept. 1253.

In our view, the failure to file a declaration concerning membership documents in Form 9 is clearly a technical defect which was fatal to the first application. There has been *no* assessment of the wishes of the employees in this case in relation to their desire to be represented by the applicant or the intervener in collective bargaining. Therefore, having regard to the reason for dismissing the applicant's first application for certification and the Board's concern about the balancing of competing interests discussed in the cases referred to, the intervener's motion to dismiss this application is dismissed.

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[Balance of decision omitted: Editor]

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1985

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**1338-83-R:**United Food and Commercial Workers International Union, Local 175, (Applicant) v. Silverstein's Bakery Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all driver salesmen and special drivers employed by the respondent in and out of its bakery at 195 McCaul Street, Toronto, save and except route supervisors, persons above the rank of route supervisor and persons regularly employed for not more than twenty-four (24) hours per week." (36 employees in unit). (*Clarity Note*).

**0336-84-R:**United Food and Commercial Workers International Union, (Applicant) v. Famz Foods Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88 and Canadian Union of Restaurant and Related Employees, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2) v. Group of Employees, (Objectors).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1426 London Road, in the City of Sarnia, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (43 employees in unit).

**1052-84-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Di Marco Plumbing and Heating Company Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**1147-84-R:**Ontario Nurses' Association, (Applicant) v. Rainy River Valley Health Care Facilities, Inc., (Respondent).

Unit #1: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Rainy River, Ontario, save and except the Nurse Administrator, persons above the rank of Nurse Administrator, and those persons regularly employed for more than 24 hours per week." (4 employees in unit). (*Having regard to the agreement of the parties*).

**1362-84-R:**Canadian Union of Public Employees, (Applicant) v. The Dundas County Association for the Mentally Retarded Incorporated, (Respondent).

Unit #1: "all employees of the respondent in Morrisburg, Williamsburg, and Winchester, save and except Administrator, Executive Director, Residential Director, Executive Secretary, Office Manager, Workshop Manager, persons above the rank of Director, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (62 employees in unit). (*Clarity Note*).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

**1721-84-R:**Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Rahims Foods Limited, (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 540 Montreal Road, Ottawa, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (47 employees in unit). (*Having regard to the agreement of the parties*).

**1781-84-R:**Retail, Wholesale and Department Store Union, AFL-CIO-CLC:, (Applicant) v. Simpsons Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all office and clerical employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at its retail stores in Windsor, Ontario, save and except personnel and office manager, persons above the rank of personnel and office manager, and students employed on a co-operative programme with a school, college or university." (13 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office and clerical employees of the respondent at its retail stores in Windsor, Ontario, save and except personnel and office manager, persons above the rank of personnel and office manager, lead hand in Personnel Department, secretary to the store manager, intermediate clerical in Personnel, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative programme with a school, college or university." (5 employees in unit). (*Clarity Note*).

**1838-84-R:**Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Limited, (Respondent).

Unit: "all employees of the respondent at its premises at 1591 Wilson Avenue, Downsview, Ontario, save and except chefs and persons above the rank of chef." (8 employees in unit). (*Having regard to the agreement of the parties*).

**1932-84-R:** Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Cara Operations Limited, (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 950 Lawrence Avenue West, Toronto, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (54 employees in unit). (*Having regard to the agreement of the parties*).

**2174-84-R:** Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. 485376 Ontario Limited, (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 2930 Carling Avenue, Ottawa, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (58 employees in unit). (*Having regard to the agreement of the parties*).

**2329-84-R:** United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. Cara Operations Limited (Retail Stores Division), (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Cara Operations Limited (Retail Stores Division) regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in its gift stores and drug stores at Terminal 1 and Terminal 2, Toronto International Airport, Malton, Ontario, save and except assistant managers, supervisors, persons above the rank of assistant manager or supervisor; pharmacists and office and clerical staff." (24 employees in unit).

**2967-84-R:** Canadian Union of Educational Workers, (Applicant) v. Trent University, (Respondent).

Unit: "all part-time employees of the respondent employed in the Province of Ontario in teaching, demonstrating, tutoring, or marking in the academic programs of the University, save and except employees in bargaining units for which any trade union held bargaining rights as of February 5, 1985." (81 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**3357-84-R:** Ontario Nurses' Association, (Applicant) v. The Regional Municipality of Ottawa-Carleton, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity of the Regional Municipality of Ottawa-Carleton Homes for the Aged, regularly employed for not more than twenty-four hours per week, save and except director of nursing and those above the rank of director of nursing." (33 employees in unit). (*Having regard to the agreement of the parties*).



**3394-84-R:**The Ontario Provincial Conference of Bricklayers and Allied Craftsmen, (Applicant) v. W. Van Erp Masonry Inc., (Respondent).

Unit #1: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit). (*Having regard to the agreement of the parties*).

**0071-85-R:**United Steelworkers of America, (Applicant) v. Pleasant Rest Nursing Home Ltd., (Respondent).

Unit #1: "all employees of the respondent in the Municipality of L'Orignal, save and except supervisors, persons above the rank of supervisor, office staff, registered nurses, persons employed for less than twenty-four (24) hours per week, and students employed during the school vacation period." (32 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent employed for less than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and registered nurses." (16 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0127-85-R:**United Steelworkers of America, (Applicant) v. Lamarquette Nursing Home (Canada) Ltd., (Respondent).

Unit #1: "all employees of the respondent in the Municipality of L'Orignal, save and except supervisors, persons above the rank of supervisor, office staff, registered nurses, persons employed for less than twenty-four (24) hours per week, and students employed during the school vacation period." (28 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent employed for less than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff, and registered nurses." (21 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0151-85-R:**Ontario Nurses Association, (Applicant) v. McKellar General Hospital, (Respondent).

Unit: "all graduate and registered nurses employed by the respondent at Thunder Bay engaged in direct nursing care of patients, save and except the Director of Health Services, Head Nurses, persons above the rank of Head Nurse, and those persons for whom the applicant or any other trade union held bargaining rights on April 19, 1985, the date of this application." (4 employees in unit).

**0158-85-R:**International Union of Operating Engineers, Local 796, (Applicant) v. Central Oxygen Limited, Central Oxygene Limitee, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent in Ottawa, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.”(5 employees in unit).(*Having regard to the agreement of the parties*).

**0252-85-R:**Labourers’ International Union of North America, Local 183, (Applicant) v. Robert Latreille Investments Inc. & Kings Point Developments Limited each carrying on business as Calvert-Dale Management, (Respondents).

Unit #1:“all construction labourers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.”(3 employees in unit).(*Having regard to the agreement of the parties*).

Unit #2:“all construction labourers in the employ of the respondents in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic portion of the Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.”(3 employees in unit).(*Having regard to the agreement of the parties*).

**0317-85-R:**United Food and Commercial Workers International Union AFL-CIO-CLC, (Applicant) v. Martins Foods Company, a division of Pillsbury Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent at St. Jacobs, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, seasonal employees, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.”(21 employees in unit).(*Having regard to the agreement of the parties*).

**0322-85-R:**Labourers International Union of North America Local 506, (Applicant) v. Seamless Surface Limited, (Respondent).

Unit #1:“all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.”(6 employees in unit).

Unit #2:“all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.”(6 employees in unit).(*Clarity Note*).

**0335-85-R;0336-85-R:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Domtech Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent in Trenton, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff.”(73 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

**0342-85-R:**United Steelworkers of America, (Applicant) v. Bakermat Inc., (Respondent).

Unit:“all employees of the respondent in the City of Ottawa, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.”(23 employees in unit).(*Having regard to the agreement of the parties*).

**0374-85-R:**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Applicant) v. O'Connor Tanks Limited, (Respondent).

Unit:“all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and engineering staff and students employed during the school vacation period.”(59 employees in unit).(*Having regard to the agreement of the parties*).

**0390-85-R:**United Steelworkers of America, (Applicant) v. Architectural Plastics Limited, (Respondent).

Unit:“all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(8 employees in unit).(*Having regard to the agreement of the parties*).

**0395-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Essex County Library Board, (Respondent).

Unit:“all employees of the respondent in the County of Essex, save and except Deputy Chief Librarian, persons above the rank of Deputy Chief Librarian, Secretary to the Chief Librarian, Co-ordinator of Technical Services and persons employed for not more than twenty-four (24) hours per week.”(15 employees in unit).(*Having regard to the agreement of the parties*).

**0396-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Essex, (Respondent).

Unit:“all employees of the respondent in the County of Essex, save and except Department Heads, persons above the rank of Department Head, the Executive Secretary, Secretary to the Administrative Assistant, Secretary to the Personnel Coordinator, Building Maintenance Supervisor, Supervisor of Central Duplicating, Assistant Engineer, Road Maintenance Foreman, Assistant Road Maintenance Foreman, Senior Planner, Supervisors in Social and Family Services, Operations Manager, Assistant Operations Manager, Secretary to the Administrator in Social and Family Services, persons regularly employed for not more than twenty-four (24) hours per week and employees in bargaining units for which any trade union held bargaining rights as of May 15, 1985, the date of application.”(54 employees in unit).(*Having regard to the agreement of the parties*).



**0397-85-R:**Hotel, Clubs, Restaurants and Taverns Employees' Union, Local 261, (Applicant) v. Beaver Foods Limited, (Respondent).

Unit: "all employees of the respondent at Canada Mortgage and Housing Corporation, Montreal Road, Ottawa, save and except manager, persons above the rank of manager, chef and office staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

**0398-85-R:**Sheet Metal Workers' International Association, (Applicant) v. Donovan & Lebeau Limited, (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices, sheeters, sheeters' assistants and material handlers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices, sheeters, sheeters' assistants and material handlers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0426-85-R:**United Steelworkers of America, (Applicant) v. Temple Wire Products Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (31 employees in unit). (*Having regard to the agreement of the parties*).

**0440-85-R:**London and District Service Workers' Union, Local 220 - SEIU-AFL-CIO-CLC, (Applicant) v. Meaford General Hospital, (Respondent).

Unit: "all employees of the respondent in Meaford, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, paramedical employees, office and clerical staff." (19 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0447-85-R:**United Steelworkers of America, (Applicant) v. Bulk-Lift Canada Ltd., (Respondent).

Unit: "all employees of the respondent in Hawkesbury, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (69 employees in unit). (*Having regard to the agreement of the parties*).

**0450-85-R:**Teamsters Local Union 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Lake Simcoe Enterprises Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period." (32 employees in unit). (*Having regard to the agreement of the parties*).

**0460-85-R:** United Food & Commercial Workers, Local 206, chartered by the United Food & Commercial Workers International Union C.L.C., A.F.L., C.I.O., (Applicant) v. Versa Services, (Respondent).

Unit: "all employees of the respondent employed in its catering operation at 809 Wellington N., in the City of Kitchener, save and except Unit Manager and persons above the rank of Unit Manager." (5 employees in unit).

**0462-85-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 2679, (Applicant) v. Harmony Store Fixtures Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

**0488-85-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Jaloy Manufacturing Co. (Canada) Inc., (Respondent).

Unit: "all employees of the respondent in Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week." (17 employees in unit). (*Having regard to the agreement of the parties*).

**0506-85-R:** Service Employees International Union Local 204 Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Dalhousie Retirement Home Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Brantford, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, supervisors, persons above the rank of supervisor and office staff." (14 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0518-85-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Finlay Greenwood Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except supervisors, those above the rank of supervisor, dispatcher, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (64 employees in unit). (*Having regard to the agreement of the parties*).

**0520-85-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Alpha-Vico Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Brantford, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

**0533-85-R:** Ontario Secondary School Teachers' Federation, (Applicant) v. The Victoria County Board of Education, (Respondent).

Unit: "all occasional teachers employed by the respondent in its secondary school panel in the County of Victoria, save and except employees in the bargaining units for which any trade union held bargaining rights as of June 4, 1985 being the date of application." (38 employees in unit). (*Having regard to the agreement of the parties*).

**0540-85-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. International Vac Pac Inc., (Respondent).

Unit: "all employees of the respondent at Port Hope, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**3477-84-R:** Labourers International Union of North America, Local 506, (Applicant) v. The Board of Education for the City of Toronto, (Respondent) v. Operative Plasterers' and Cement Masons' International Association of United States and Canada, Local 598, (Intervener).

Unit: "all cement masons and their apprentices employed by the respondent in the maintenance and construction department in the City of Toronto, save and except trade supervisors, persons above the rank of trade supervisor, employees in bargaining units for which any trade union, other than the intervener, held bargaining rights on March 28, 1985, and persons for which the following trade unions held bargaining rights with the respondent on March 28, 1985 through the Toronto-Central-Ontario Building and Construction Trades Council: (1) International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 95, 20 Holly Street, Suite 102, Toronto, Ontario M4S 3B1, Telephone: 487-2454 - Attention: Mr. Bob Beamish; (2) International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 128, 7 Queen Elizabeth Blvd., Toronto, Ontario M8Z 1L9, Telephone: 251-6585 - Attention: Mr. Stan Petronski; (3) International Union of Bricklayers and Allied Craftsmen, Local No. 2, 30 Commercial Road, Toronto, Ontario M4G 1Z6, Telephone: 429-3311; (4) Carpenters' District Council of Toronto and Vicinity Carpenters Council, 290 Lawrence Avenue West, Toronto, Ontario M5M 1B3, Telephone: 789-7231 - Attention: Mr. F. Rimes; (5) International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 721, 1604 Bloor Street West, Toronto, Ontario M6P 1A7, Telephone: 534-8489 - Attention: Mr. A. Macisaac; (6) Marble Masons, Tile-Setters and Terrazzo Mechanics, Local No. 31, 718 Wilson Avenue, Suite 203, Downsview, Ontario M3K 1E2, Telephone: 635-9365 - Attention: Mr. R. Anthony; (7) The Resilient Floor Workers United Brotherhood of Carpenters and Joiners of America, Local 2965, 290 Lawrence Avenue West, Toronto, Ontario M5M 1B3, Telephone: 780-7231 - Attention: Mr. H. Hinton; (8) Sheet Metal Workers' International Association, Local No. 30, 15 Gervais Drive, Suite 507, Don Mills, Ontario M3C 1Y8, Telephone: 449-0540 - Attention: Mr. A.E. White; (9) International Brotherhood



of Painters & Allied Trades, D.C. 46, 1815 Yonge Street, Toronto, Ontario M4T 2A3, Attention: Mr. A. Ross, Telephone: 483-6412.''(6 employees in unit).(*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		1

**0116-85-R:**Canadian Union of Public Employees, (Applicant) v. The Hastings County Board of Education, (Respondent).

Unit: "all office, clerical, and technical employees of the respondent in the County of Hastings, save and except supervisors, managers and co-ordinators, persons above the rank of supervisor, manager, co-ordinators, secretaries to senior administrative staff, attendance counsellor, liaison officer, senior buyer transportation officer, administrative assistants, adult supervisors, persons employed in the staff services department and employees in bargaining units for which a trade union held bargaining rights as of April 15, 1985, specifically 1) Ontario Secondary School Teachers Federation and its branch affiliate, District 19; 2) Ontario Public School Teachers Association; 3) Federation of Women Teachers Association of Ontario and 4) Canadian Union of Public Employees Local 1022.''(174 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

Number of names of persons on revised voters' list		174
Number of persons who cast ballots	166	
Number of ballots marked in favour of applicant		105
Number of ballots marked against applicant		60
Ballots segregated and not counted		1

**0275-85-R:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Canada Cement Lafarge Ltd., (Respondent) v. Cement, Lime, Gypsum and Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC, (Intervener).

Unit: "all employees of the respondent at its plant on Highway 2 seven miles west of Woodstock in the Township of Zorra, County of Oxford, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and technical staff (including laboratory technicians), employees in the bargaining units for which any trade union held bargaining rights as of May 2nd, 1985, being the date of application, students employed on a cooperative training basis with a school, college or university, and security guards.''(109 employees in unit).(*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	120
Number of persons who cast ballots	103
Number of ballots marked in favour of applicant (UAW)	91
Number of ballots marked in favour of intervener (CEMENT LIME)	12

**0276-85-R:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Sivaco Ontario Division of Ivaco Inc.,

(Respondent) v. Cement, Lime, Gypsum and Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC, (Intervener).

Unit: "all employees of Sivaco Ontario, Division of Ivaco Inc., Ingersoll, Ontario save and except foremen, persons above the rank of foreman, office and sales staff." (64 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		68
Number of persons who cast ballots	68	
Number of ballots marked in favour of applicant		65
Number of ballots marked in favour of intervener		3

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**1147-84-R:** Ontario Nurses' Association, (Applicant) v. Rainy River Valley Health Care Facilities, Inc., (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Rainy River, Ontario, save and except the Nurse Administrator, persons above the rank of Nurse Administrator, and those persons regularly employed for not more than 24 hours per week." (3 employees in unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		1

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

**1822-84-R; 1823-84-R:** United Food & Commercial Workers International Union, Local 175, (Applicant) v. 389393 Ontario Ltd. c.o.b. as Boucher's Amherstview Supermarket, (Respondent) v. Group of Employees, (Objectors); United Food & Commercial Workers International Union, Local 633, (Applicant) v. 389393 Ontario Ltd., c.o.b. as Boucher's Amherstview Supermarket, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent in its stores at Amherstview, Ontario, save and except full-time meat department employees, assistant store manager, persons above the rank of assistant store manager, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (14 employees in unit).

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	5

Unit #3: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

**3259-84-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Karl Thier Construction Ltd., and/or Penka Carpentry Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent engaged in residential construction in the Province of Ontario, (excluding O.L.R.B.) Areas No. 1, 19-25 inclusive), save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0
Ballots segregated and not counted	1

**0184-85-R:**International Ladies' Garment Workers' Union, (Applicant) v. Russill H. Morin Products (1983) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, designers, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (83 employees in unit).

Number of names of persons on revised voters' list	82
Number of persons who cast ballots	75
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	26

### Applications for Certification Dismissed - No Vote Conducted

**0918-83-R:**Christian Labour Association of Canada, (Applicant) v. Marsdale Manor Nursing Home, owned and operated by Versa-Care Limited, (Respondent) v. Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union, (Intervener). (39 employees in unit).

**1061-84-R:**Ottawa Newspaper Guild, Local 205 of The Newspaper Guild, (Applicant) v. The Citizen, a division of Southam, Inc., (Respondent). (0 employees in unit).

**1362-84-R:**Canadian Union of Public Employees, (Applicant) v. The Dundas County Association for the Mentally Retarded Incorporated, (Respondent). (12 employees in unit).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).



**2793-84-R:**Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. A-C-H International, (Respondent) v. Group of Employees, (Objectors).(19 employees in unit).

**3367-84-R:**Consolidated Beef Corporation Employees' Association, (Applicant) v. Consolidated Beef Corporation, (Respondent) v. United Food and Commercial Workers International Union, (Intervener).(32 employees in unit).

**3444-84-R:**Butterfield Workers Association, (Applicant) v. Butterfield Division, Litton Canada Inc., (Respondent) v. Communications, Electronic, Electrical, Technical and Salaried Workers of Canada, (Intervener).(146 employees in unit).

**0025-85-R:**Labourers' International Union of North America, Local 527, (Applicant) v. Canadian Lumbermen's Association, (Respondent).(15 employees in unit).

**0445-85-R:**Ontario Secondary School Teachers' Federation, (Applicant) v. The Kent County Board of Education, (Respondent).(36 employees in unit).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**0156-85-R:**United Paperworkers International Union, (Applicant) v. Kimberly-Clark of Canada Limited, (Respondent).

Unit:"all office and clerical employees of the respondent at Terrace Bay, Ontario, save and except supervisors, persons above the rank of supervisor, technicians, draftspeople, technologist, engineers, chemists, secretary to the Manager of Compensation and staff development, secretary/clerk-employment and labour relations, occupational health nurse, safety coordinator, training mill manager, secretary to the director of industrial relations, secretary to the controller, secretary to the manager financial and general accounting, students employed on a cooperative training basis with a college, school or university in an office or clerical capacity and employees in the bargaining units for which any trade union held bargaining rights as of April 18, 1985 being the date of application."(54 employees in unit).(*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	58
Number of persons who cast ballots	59
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	32
Ballots segregated and not counted	2

**0188-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Toronto Aged Men's and Women's Homes (Belmont House), (Respondent).

Unit:"all employees of the respondent in Metropolitan Toronto, Ontario, save and except, Professional Medical Staff, Registered and Graduate Nurses, Supervisors, persons above the rank of Supervisor, office and clerical employees, persons regularly employed for not more

than twenty-four hours per week and students employed during the school vacation period.'' (47 employees in unit).

Number of names of persons on revised voters' list		53
Number of persons who cast ballots	51	
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		27
Ballots segregated and not counted		3

**0195-85-R:**Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, (Applicant) v. Reuter-Stokes Canada, Limited, (Respondent).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed within a co-operative educational program." (53 employees in unit).

Number of names of persons on list as originally prepared by employer		56
Number of persons who cast ballots	52	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		30

**0316-85-R:**International Molders and Allied Workers Union, (Applicant) v. Webster Mfg. (London) Limited, (Respondent).

Unit: "all office and clerical employees of the respondent at London, Ontario, save and except supervisors, persons above the rank of supervisor, personnel department, secretary to the president, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period or employed on a co-operative education training program and employees in the bargaining units for which any trade union held bargaining rights as of May 2, 1985." (22 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		10

**0320-85-R:**Canadian Union of Operating Engineers and General Workers, (Applicant) v. Master Patterns Inc., (Respondent).

Unit: "all employees of the respondent at Windsor save and except foremen, persons above the rank of foreman, office staff, salesmen and persons employed for not more than 24 hours per week." (33 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		17

**0364-85-R:**United Steelworkers of America, (Applicant) v. Colortron Photo Services Limited, (Respondent).

Unit: "all employees of the respondent in Hamilton and Stoney Creek, save and except supervisors, persons above the rank of supervisor, office and sales and retail stores' staff." (191 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	190
Number of persons who cast ballots	184
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	80
Number of ballots marked against applicant	101
Ballots segregated and not counted	2

**0399-85-R:** International Woodworkers of America, (Applicant) v. Melnor Manufacturing Ltd., (Respondent) v. Melnor Shop Union, (Intervener).

Unit: "all employees of Melnor Manufacturing Ltd. at Brantford save and except forepersons, persons above the rank of forepersons, office and sales staff." (69 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	70
Number of names of persons who cast ballots	69
Number of ballots marked in favour of applicant	25
Number of ballots marked in favour of intervener	41
Ballots segregated and not counted	3

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**1822-84-R; 1823-84-R:** United Food & Commercial Workers International Union, Local 175, (Applicant) v. 389393 Ontario Ltd. c.o.b. as Boucher's Amherstview Supermarket, (Respondent) v. Group of Employees, (Objectors); United Food & Commercial Workers International Union, Local 633, (Applicant) v. 389393 Ontario Ltd., c.o.b. as Boucher's Amherstview Supermarket, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all meat department employees of the respondent in its stores at Amherstview, Ontario, save and except assistant store manager, persons above the rank of assistant store manager, persons employed for not more than twenty-four hours per week, and students employed during the school vacation periods." (3 employees in unit).

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	2

Unit #2: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #3: "all employees of the respondent in its stores at Amherstview, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods, save and except assistant store manager, and persons above the rank of assistant store manager." (13 employees in unit).

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	4



Number of ballots marked against applicant

5

**3174-84-R:**Labourers' International Union of North America, Local Union 183, (Applicant) v. Cayuga Materials & Construction Co. Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3

**3350-84-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Turpin Pontiac Buick Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Ottawa, save and except foremen and persons above the rank of foreman; assistant shop foreman; control tower operators; time-keepers; service writers; office, sales and clerical staff; security guards; persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (65 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	64
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	51

**0093-85-R:**Retail, Wholesale and Department Store Union AFL:CIO:CLC:, (Applicant) v. C.A. Dunnett & Sons Limited c.o.b. Niagara Farms Market, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Niagara Falls and Welland, save and except assistant store managers and those above the rank of assistant store manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (70 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	58
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	31

Unit #2: "all employees of the respondent at Niagara Falls and Welland regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except assistant store managers and those above the rank of assistant store manager, office and clerical staff." (14 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		14
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		8

**0135-85-R:**Energy and Chemical Workers Union, (Applicant) v. Menu Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (93 employees in unit).

Number of names of persons on list as originally prepared by employer		88
Number of persons who cast ballots	88	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		36
Number of ballots marked against applicant		50

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**2252-84-R:**Ontario Nurses' Association, (Applicant) v. Sudbury Algoma Hospital, (Respondent).

**0331-85-R:**Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Middlesex, (Respondent).

**0418-85-R:**Christian Labour Association of Canada, (Applicant) v. Blenheim Community Nursing Home Ltd., (Respondent).

**0429-85-R:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Dowling I.G.A., (Respondent).

**0463-85-R:**Canadian Union of Public Employees, (Applicant) v. The London Public Library Board, (Respondent).

**0464-85-R:**Canadian Union of Public Employees, (Applicant) v. Royal Botanical Gardens, (Respondent).

**0475-85-R:**United Steelworkers of America, (Applicant) v. International Paints (Canada) Ltd., (Respondent).

**0537-85-R:**Administrative Clerical and Support Staff; Elementary and High School Secretarial Staff and Educational Aides to be known as the: Hamilton-Wentworth R.C. Separate School Board/Board of Governors Professional Support Staff, (Applicant) v. The Hamilton-Wentworth Roman Catholic Separate School Board, (Respondent).

**0545-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Fos-tur Pipelines Inc., Les Pipelines Fos-tur Inc., (Respondent).

**0656-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. A. Gorgi Masonry (1976) Limited, (Respondent).

**0696-85-R:**Sheet Metal Workers' International Association, (Applicant) v. J R Mechanical Heating and Air Conditioning, (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**2571-84-R:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Glencoe Insulation Co. Limited and 411271 Ontario Limited carrying on business under the registered name and style of Alcona Construction, Division of 411271 Ontario Limited, (Respondents).(*Granted*).

**2942-84-R:**Exhibit and Display Association of Canada and Panex Show Services Ltd., jointly and severally, (Applicants) v. Design-Craft Limited, Design-Craft MTCC Division and Industrial Trade Shows Incorporated, (Respondents).(*Dismissed*).

**2970-84-R:**United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. S.R. Lentz Construction Inc., 504835 Ontario Limited Concrete Dynamix Stephen Richard Lentz, (Respondents).(*Granted*).

**3367-84-R:**Consolidated Beef Corporation Employees' Association, (Applicant) v. Consolidated Beef Corporation, (Respondent) v. United Food and Commercial Workers International Union, (Intervener).(*Withdrawn*).

**0007-85-R:**Local 1891 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Imperial Painting Decorating Imperial Decorating Limited, (Respondents).(*Granted*).

**0013-85-R:**Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Mandic Bros. Drywall and Construction Ltd. 364851 Ontario Limited, (Respondents).(*Granted*).

**0045-85-R:**United Steelworkers of America, (Applicant) v. Kuehne & Nagel International Limited, and 3M Canada Inc., (Respondents) v. Group of Employees, (Objectors).(*Withdrawn*).

**0201-85-R:**The International Brotherhood of Boilermakers', Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Applicant) v. Tuberate and Besomar Company Ltd. and Besomar Manufacturing Inc., (Respondents).(*Withdrawn*).

**0230-85-R:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Jeeter Insulation Ltd. and Palco Insulation Limited, (Respondents).(*Withdrawn*).

**0231-85-R:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Hencze Insulation Limited and John Hencze c.o.b. under the name and style of Dundas Valley Insulation, (Respondents).(*Granted*).



**0252-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Robert Latreille Investments Inc. & Kings Point Developments Limited each carrying on business as Calvert-Dale Management, (Respondents).(*Granted*).

## **SALE OF A BUSINESS**

**2571-84-R:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Glencoe Insulation Co. Limited and 411271 Ontario Limited carrying on business under the registered name and style of Alcona Construction, Division of 411271 Ontario Limited, (Respondents).(*Granted*).

**2792-84-R:**Retail, Wholesale and Department Store Union, Local 414, AFL-CIO-CLC, (Applicant) v. Niagara Farms Market, (Respondent).(*Withdrawn*).

**2988-84-R:**Graphic Communications International Union Local 542, (Applicant) v. Glen Gray Printing (A Division of City Press Inc.), (Respondent).(*Granted*).

**3367-84-R:**Consolidated Beef Corporation Employees' Association, (Applicant) v. Consolidated Beef Corporation, (Respondent) v. United Food and Commercial Workers International Union, (Intervener).(*Granted*).

**0200-85-R:**The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, (Applicant) v. Tuberate Company Inc., and Besomar Manufacturing Inc., (Respondents).(*Granted*).

**0230-85-R:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Jeeter Insulation Ltd. and Palco Insulation Limited, (Respondents).(*Withdrawn*).

**0231-85-R:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Hencze Insulation Limited and John Hencze c.o.b. under the name and style of Dundas Valley Insulation, (Respondents).(*Granted*).

## **UNION SUCCESSOR RIGHTS**

**1574-84-R:**The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Indusmin Ltd., (Killarney Site), (Respondent).(*Granted*).

## **APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS**

**0533-84-R:**Alain Gauthier, (Applicant) v. Labourers' International Union of North America, Local 527, (Respondent) v. Tristan Incorporated, (Intervener).

Unit: "all construction labourers including Masons' or Bricklayers' tenders, plasterers or plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration

work and all other construction employees engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario (on January 30, 1985).”(4 employees in unit).(*Granted*).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		1
Ballots segregated and not counted		3

**0753-84-R:**Charles Wogrinetz, (Applicant) v. Local Union No. 26, The United Rubber, Cork, Linoleum & Plastic Workers of America, (Respondent) v. Viceroy Rubber & Plastics Limited, (Intervener).(45 employees in unit).(*Granted*).

**2729-84-R:**Charles Wogrinetz, (Applicant) v. Local Union No. 126, The United Rubber, Cork, Linoleum & Plastic Workers of America, (Respondent) v. Viceroy Rubber & Plastics Limited, (Intervener) v. Group of Employees, (Objectors).(40 employees in unit).(*Granted*).

**3085-84-R:**Employees of Anson General Hospital, (Applicant) v. United Steelworkers of America, Local 13911, (Respondent).(28 employees in unit).(*Granted*).

**3399-84-R:**The Employees of Canada Wood Specialty 83, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, (Respondent) v. Canada Wood Specialty (1983) Limited, (Intervener).(29 employees in unit).(*Dismissed*).

**3424-84-R:**Paul Barker, (Applicant) v. United Steelworkers of America, (Respondent).(12 employees in unit).(*Granted*).

**3496-84-R:**Raymond Harold Yates, (Applicant) v. International Union of Operating Engineers Local 796, (Respondent).(1 employee in unit).(*Granted*).

**3499-84-R:**The Boys and Girls Club of Ottawa-Carleton, (Applicant) v. Canadian Union of Public Employees, Local 2900, (Respondent).(40 employees in unit).(*Granted*).

**0053-85-R:**Tim MacDonell, (Applicant) v. Labourers' International Union of North America, Local 527, (Respondent).(15 employees in unit).(*Dismissed*).

**0139-85-R:**Diane Thorne representing the employees of York Barbell Co. Ltd., (Applicant) v. United Steelworkers of America, (Respondent) v. York Barbell Co. Ltd., (Intervener).(40 employees in unit).(*Granted*).

**0216-85-R:**Unionized Office Employees of Nabisco Brands Ltd. (International Brotherhood of Firemen & Oilers - Local 101B), (Applicant) v. International Brotherhood of Firemen & Oilers, (Respondent).(5 employees in unit).(*Granted*).

**0290-85-R:**Lance Refell, on his behalf and on behalf of a group of employees, (Applicant) v. United Steelworkers of America, (Respondent).(21 employees in unit).(*Granted*).

**0314-85-R:**Stasha Hemingway, (Applicant) v. United Steelworkers of America, (Respondent).(75 employees in unit).(*Granted*).

**0383-85-R:**John Stasiuk, Ronald G.J. Rubic, Ronald J. Rubic, (Applicants) v. Retail, Wholesale & Department Store Union Local 579 AFL-CIO-CLC, (Respondent) v. Sparton Motor Hotel Corp. Ltd. carrying on business as Frood Hotel, (Employer).(3 employees in unit).(*Granted*).

**0647-85-R:**General Office Simpsons Limited Kitchener, (Applicant) v. Retail Wholesale and Department Store Union Local 414, (Respondent).(17 employees in unit).(*Withdrawn*).

## **REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER**

**3070-84-M:**Danver Ambulance Service Inc., (Employer) v. Ontario Public Service Employees Union, (Trade Union).

## **REFERRAL AS TO APPOINTMENT TO BOARD OF ARBITRATION**

**3080-84-M:**Windsor Western Hospital (Riverview Unit), (Employer) v. Ontario Nurses' Association, (Trade Union) v. Anisia Mordowanec, (Intervener).

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE**

**0046-85-U:**Ontario Hydro, (Applicant) v. Canadian Union of Public Employees, C.L.C., Ontario Hydro Employees' Union Local 1000, Al Beath, Dave Hepburn, Dave Hamilton, Dave Cooper, G. Messer, Cam Fraser, T. Potter, J. Miscione, Wayne Dent, Chuck Paquette, Fred Snow, Jim Vernelli, Bill Graham, John Brisimitzis, Lloyd Church, Harry Forrester, Harry Vanderzwet, John Smith, Jim Leslie, A. Zwaigenbaum, B. Watson, M. Thacker, D. Dudley, Rudy Bronkhorst and R. Lukas, (Respondents).(*Withdrawn*).

**0617-85-U:**Hickeson-Langs Supply Company, A Division of Oshawa Holdings Limited, and The Ontario Produce Company, The Oshawa Food Division of The Oshawa Group Limited, (Applicants) v. Teamsters Local Union No. 419, Warehousemen and Miscellaneous Drivers affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and The Canadian Conference of Teamsters, and Vern McGuire, (Respondents).(*Dismissed*).

**0710-85-U;0711-85-U;0729-85-U:**Consumers Distributing Company Limited, (Applicant) v. Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Officers and Agents of the Union as listed on Appendix "A" hereto, (Respondents); Consumers Distributing Company Limited, (Applicant) v. Employees of the Applicant as Listed on Appendix "B" hereto and others, (Respondents); Consumers Distributing Company Limited, (Applicant) v. Ghiansaroop (John) Persaud, Peter Harte, Joe Donato, Robert Pucl, John Fleming, Locksley Blades, (Respondents).(*Granted*).



## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

**2763-84-U:**Exhibit and Display Association of Canada, and Panex Show Services Ltd., jointly and severally, (Applicants) v. Labourers' International Union of North America, Local 506, Design-Craft MTCC Division, (Respondents) v. Bill McPherson, John McAloon, George Dixon and John Norm McPherson, (Interveners).(*Dismissed*).

**0535-85-U:**Belmont Construction Company Limited and 900 Yonge St. Ltd., (Applicant) v. Labourers' International Union of North America, Local 183, A. Bannone, M. Zavarella, L. Pecchia, M. Jesus and A.F. Indio, (Respondents).(*Withdrawn*).

**0536-85-U:**Belmont Construction Company Limited and 900 Yonge St. Ltd., (Applicant) v. International Brotherhood of Painters and Allied Trades District Council 46 and Len Anderson and Sergio Pantarotto, (Respondents).(*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**2082-81-U:**The International Association of Bridge, Structural and Ornamental Ironworkers Locals 721, 736, 759, 765, and 786, and Kenneth Childs, Allan MacIsaac, John Donaldson, Larry Baillie, Gordon Verdecchia, and Donald Melvin on their own behalf, and on behalf of each and every member of the aforementioned trade unions, and on behalf of the said local trade unions, (Complainants) v. The International Association of Bridge, Structural and Ornamental Ironworkers, Norman Wilson, and James Phair, (Respondents).(*Dismissed*).

**2456-83-U:**Lorraine Seguin, (Complainant) v. John Rennie Ltd., (Respondent).(*Withdrawn*).

**0166-84-U:**International Woodworkers of America, (Complainant) v. Canarinda Manufacturing Ltd., (Respondent).(*Granted*).

**0861-84-U:**Retail, Wholesale and Department Store Union AFL-CIO-CLC, (Complainant) v. T. Eaton Company Limited, The Cadillac Fairview Corporation Limited and T.E.C. Leaseholds Limited, (Respondents).(*Granted*).

**1200-84-U:**Lorraine Seguin, (Complainant) v. Joe Sutter - Union Representative Amalgamated Clothing & Textiles Workers' Union, (Respondent).(*Withdrawn*).

**1532-84-U:**United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Aristokraft Vinyl Inc., (Respondent).(*Dismissed*).

**1719-84-U:**The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Complainant) v. Kermecho Co. Ltd., (Respondent).(*Granted*).

**1965-84-U:**George, Murray & Shipley, (Complainant) v. Millwrights & Machine Erectors Local 1592, (Respondent).(*Withdrawn*).

**2046-84-U:**United Steelworkers of America, (Complainant) v. Elks Inc., (Respondent).(*Withdrawn*).

**2304-84-U:**United Brotherhood of Carpenters and Joiners of America, Local 2041, (Complainant) v. G. Lavictore and Brothers Ltd., (Respondent).(*Granted*).

**2762-84-U:**Exhibit and Display Association of Canada, and Panex Show Services Ltd., jointly and severally, (Complainants) v. Labourers' International Union of North America, Local 506, Design-Craft MTCC Division, (Respondents).(*Dismissed*).

**2880-84-U:**Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. A-C-H International, (Respondent).(*Withdrawn*).

**2904-84-U:**Abdel Elejel, (Complainant) v. International Molders & Allied Workers Union, Local 49 (London), (Respondent) v. The Windsor Machine Company c.o.b. as Hifield Canada, (Intervener).(*Granted*).

**3015-84-U:**United Food & Commercial Workers Union Local 486, (Complainant) v. Ogilvie I.G.A., (Respondent).(*Withdrawn*).

**3094-84-U:**Murray Alan Dahms, (Complainant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink, and Distillery Workers Local No. 173 and Koch Transport Limited, (Respondents).(*Withdrawn*).

**3170-84-U:**United Food and Commercial Workers International Union, Local 175, (Complainant) v. 389393 Ontario Ltd. c.o.b. Bouchers Amherstview Supermarket, (Respondent).(*Withdrawn*).

**3252-84-U:**United Food & Commercial Workers International Union, Local 175, (Complainant) v. 389393 Ontario Ltd. c.o.b. Bouchers Amherstview Supermarket, (Respondent).(*Withdrawn*).

**3335-84-U:**Russell Overland, (Complainant) v. Canadian Union of Public Employees, Local 67, (Respondent) v. The Corporation of The City of Sault Ste. Marie, (Intervener).(*Dismissed*).

**3462-84-U:**Anisia Mordowanec, (Complainant) v. Ontario Nurses Association (ONA), (Respondent).(*Dismissed*).

**3492-84-U:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Macy's Terminal Enterprises Ltd., (Respondent).(*Withdrawn*).

**3503-84-U:**Peter Morelli, (Complainant) v. Lucien Tremblay, Ernie Cohen, Ray McPhee, Steve Tomasco, Prince Hotel, Local 75, (Respondents).(*Dismissed*).

**0011-85-U:**United Food and Commercial Workers International Union, (Complainant) v. First Choice Hair Cutters, (Respondent).(*Withdrawn*).

**0012-85-U:**Donald Belanger, (Complainant) v. The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1425, (Respondent) v. Commonwealth Construction Company, (Intervener).(*Dismissed*).

**0033-85-U:**United Food & Commercial Workers International Union, (Complainant) v. Stepping Stones Nursing Home, (Respondent).(*Withdrawn*).

**0124-85-U:**Ontario Public Service Employees Union, (Complainant) v. Youthdale Treatment Centre Ltd., (Respondent).(*Withdrawn*).

**0149-85-U:**Leonora Da Rosa, (Complainant) v. United Food and Commercial Workers International Union, (Respondent).(*Withdrawn*).

**0154-85-U:**United Steelworkers of America, (Complainant) v. Contact Personnel, (Respondent).(*Withdrawn*).

**0182-85-U:**Anthony Gene Woodhouse, (Complainant) v. Jaddco Anderson Ltd., (Respondent) v. Ironworkers Union, Local 736, (Intervener).(*Dismissed*).

**0204-85-U:**International Union of Operating Engineers, Local 796, (Complainant) v. Ottawa-Carleton Regional Hospital Food Services, (Respondent).(*Withdrawn*).

**0208-85-U:**Mrs. Margaret Parks, (Complainant) v. Mr. Wilder Negrette, Area Steward, the Grievance Committee and the Executive of Local 145 of the Amalgamated Clothing & Textile Workers Union, Xerographic Division, (Respondent).(*Withdrawn*).

**0226-85-U:**United Steelworkers of America, (Complainant) v. Converter Man Limited, (Respondent).(*Withdrawn*).

**0228-85-U:**Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Honest Ed's Limited, (Respondent).(*Withdrawn*).

**0237-85-U:**Health, Office & Professional Employees, a division of Local 206, United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union C.L.C., A.F.L., C.I.O., (Complainant) v. North Park Nursing Home Ltd., (Respondent).(*Withdrawn*).

**0238-85-U:**Health, Office & Professional Employees, a division of Local 206, United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union C.L.C., A.F.L., C.I.O., (Complainant) v. North Park Nursing Home Ltd., (Respondent).(*Withdrawn*).

**0239-85-U:**Health, Office & Professional Employees, a division of Local 206, United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union C.L.C., A.F.L., C.I.O., (Complainant) v. North Park Nursing Home Ltd., (Respondent).(*Withdrawn*).

**0241-85-U:**Health, Office & Professional Employees, a division of Local 206, United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union C.L.C., A.F.L., C.I.O., (Complainant) v. North Park Nursing Home Ltd., (Respondent).(*Withdrawn*).



**0246-85-U:**Local 0125L Union Committee, (Complainant) v. A.R. Clarke and Co. Ltd., (Respondent).(*Withdrawn*).

**0251-85-U:**Service Employees Union, Local 478, (Complainant) v. Martin Manor Retirement Home, (Respondent).(*Withdrawn*).

**0273-85-U:**Ontario Hydro Employees' Union, C.U.P.E. Local 1000, (Complainant) v. Ontario Hydro, (Respondent).(*Withdrawn*).

**0292-85-U:**Ontario Hydro, (Complainant) v. Canadian Union of Public Employees, C.L.C., Ontario Hydro Employees' Union Local 1000, et al, (Respondents).(*Withdrawn*).

**0351-85-U:**Mae Pati, (Complainant) v. Xerox of Canada and Representatives of Local 14J, (Respondent) v. Amalgamated Clothing and Textile Workers Union Local 14J, (Intervener).(*Withdrawn*).

**0375-85-U:**Guilherme Lopes, (Complainant) v. United Food & Commercial Workers International Union (A.F.L.-C.I.O.-C.L.C.) Local P1105, (Respondent).(*Withdrawn*).

**0376-85-U:**Labourers' International Union of North America, Local 183, (Complainant) v. Greystone Manor Estates Inc., carrying on business under the registered name and style of Calvert-Dale Homes, (Respondent).(*Withdrawn*).

**0401-85-U:**Labourers' International Union of North America, Local 749, (Complainant) v. Ducana Building Products Limited Jack Alexander Buse, (Respondent).(*Withdrawn*).

**0402-85-U:**Canadian Union of Public Employees, (Complainant) v. The Corporation of the County of Middlesex, (Respondent).(*Withdrawn*).

**0526-85-U:**United Food and Commercial Workers International Union, (Complainant) v. Westra Plastics (Ontario) Inc., (Respondent).(*Withdrawn*).

**0544-85-U:**Irene Kelly, (Complainant) v. Employees' Association of Kodak Canada, (Respondent).(*Withdrawn*).

**0665-85-U:**United Garment Workers of America, (Complainant) v. Cumberland Clothing Limited Mr. Paul Hecht, President, (Respondent).(*Withdrawn*).

**3468-85-U:**Ontario Nurses' Association, (Complainant) v. International Medical Clinics (A Division of Flight Medical Inc.) and Dr. R. Galliver and Transport Canada, (Respondents).(*Withdrawn*).

## APPLICATIONS FOR RELIGIOUS EXEMPTION

**3442-84-M:**Jacinto Correia, (Applicant) v. BFCSD Local 278, (Respondent Trade Union) v. Coca-Cola Ltd. Windsor, Ontario Plant 043, (Respondent Employer).(*Dismissed*).

**0340-85-M:**Linda Dianne Avery, (Applicant) v. Canadian Union of Public Employees Local 132, (Respondent Trade Union) v. Region of Durham Lakeview Manor Nursing Home Beaverton Ont., (Respondent Employer).(*Dismissed*).

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0196-85-M:**Wilson's Truck Lines Limited, (Employer) v. The Canadian Union of Drivers and General Workers, (Trade Union).(*Granted*).

**0223-85-M:**Work Wear Corporation of Canada Ltd. (Waterloo Division), (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union).(*Granted*).

**0224-85-M:**Work Wear Corporation of Canada Ltd., Belleville, Ontario, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union).(*Granted*).

**0247-85-M:**Work Wear Corporation of Canada Ltd. (Anchor Textiles Division), (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union).(*Granted*).

**0258-85-M:**Spalding Canada, Division of Spalding International, (Employer) v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC: and its Local 440, (Trade Union).(*Granted*).

**0323-85-M:**Sun Ray Solar Systems Limited, (Employer) v. Christian Labour Association of Canada, (Trade Union).(*Granted*).

**0324-85-M:**Mississauga Hydro Electric Commission, (Employer) v. Local Union 636 of the International Brotherhood of Electrical Workers, (Trade Union).(*Granted*).

## **JURISDICTIONAL DISPUTES**

**2460-84-JD:**Pigott Investments Limited, (Complainant) v. Labourers' International Union of North America, Local 837 and the United Brotherhood of Carpenters and Joiners of America, Local 18, (Respondents).(*Withdrawn*).

**3208-84-JD:**Labourers' International Union of North America Local 1036, (Complainant) v. Bird Construction Company Limited United Brotherhood of Carpenters and Joiners of America, Local 446, (Respondents).(*Withdrawn*).

**3467-84-JD:**International Brotherhood of Electrical Workers Local Union 353, (Complainant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 787, and Cimco Division of Toromont Industries Limited, (Respondents).(*Granted*).

**0125-85-JD:**The International Brotherhood of Electrical Workers, Local Union 1788, (Complainant) v. Ontario Hydro Employees Union, Local 1000, Canadian Union of Public Employees; Ontario Hydro; and The Electrical Power Systems Construction Association, (Respondents).(*Dismissed*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**3182-84-M:**Office & Professional Employees International Union, Local 473, (Applicant) v. Ault Dairies Limited, (Respondent).(*Withdrawn*).

**3347-84-M:**O.P.E.I.U. Local 343, (Applicant) v. ACTRA Fraternal Benefit Society, (Respondent).(*Withdrawn*).

**3500-84-M:**Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Lambton, (Respondent).(*Withdrawn*).

**0387-85-M:**Service Employees' International Union, Local 183, (Applicant) v. Belleville General Hospital, (Respondent).(*Withdrawn*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**2000-84-OH:**Mr. Kevin Lunn, (Complainant) v. Firestone Canada Inc., (Respondent).(*Granted*).

**2501-84-OH:**James A.F. Cowan, (Complainant) v. Ford Motor Company of Canada Ltd., (Respondent).(*Dismissed*).

**0038-85-OH:**Roy Burns, (Complainant) v. Burlington National Air Freight (Canada) Ltd., (Respondent).(*Withdrawn*).

**0118-85-OH:**Mimi Soliman, (Complainant) v. Peto McCallum Ltd., (Respondent).(*Withdrawn*).

**0353-85-OH:**Orval W. Wood, (Complainant) v. General Mtrs. Canada Oshawa, (Respondent).(*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**0799-83-M:**United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Rili Construction Weston Ltd.; Verdi Forming Ltd., (Respondents) v. Form Work Council of Ontario and Labourers' International Union of North America, Local 183, (Intervenors).(*Dismissed*).

**1666-84-M:**The United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada on its own behalf and on behalf of Local



Union 527, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondent).(*Granted*).

**2274-84-M:**Labourers' International Union of North America Local 837, (Applicant) v. Pigott Investments Limited, (Respondent).(*Withdrawn*).

**2303-84-M:**United Brotherhood of Carpenters and Joiners of America, Local 2041, (Complainant) v. G. Lavictoire and Brothers Ltd., (Respondent).(*Granted*).

**2876-84-M:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Glencoe Insulation Co. Limited and 411271 Ontario Limited carrying on business under the registered name and style of Alcona Construction, Division of 411271 Ontario Limited, (Respondents).(*Granted*).

**2907-84-M:**Exhibit and Display Association of Canada, (Applicant) v. Labourers' International Union of North America, Local 506, (Respondent).(*Dismissed*).

**2908-84-M:**Panex Show Services Ltd., (Applicant) v. Labourers' International Union of North America, Local 506, (Respondent).(*Dismissed*).

**3066-84-M:**Labourers' International Union of North America, Local 1036, (Applicant) v. Bird Construction Company Limited, (Respondent).(*Dismissed*).

**0129-85-M:**International Brotherhood of Painters and Allied Trades Local 1824, (Applicant) v. Haroun Glass Centre Inc., (Respondent).(*Granted*).

**0339-85-M:**International Brotherhood of Electrical Workers, Local 105, (Applicant) v. Sheaffer-Townsend Limited, (Respondent).(*Withdrawn*).

**0357-85-M:**United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Laurence Hoffman Contracting, (Respondent).(*Granted*).

**0403-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Denovellis and Valente Concrete and Drain, (Respondent).(*Withdrawn*).

**0404-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Frank Plastina Investments Limited, (Respondent).(*Withdrawn*).

**0405-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Lucy Construction Limited, (Respondent).(*Withdrawn*).

**0417-85-M:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Asbestos Covering Company Limited, (Respondent).(*Granted*).

**0427-85-M:**International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Imperial Painting Decorating Imperial Decorating Limited, (Respondents).(*Granted*).

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**0499-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Man-Co Construction Limited, (Respondent).(*Granted*).

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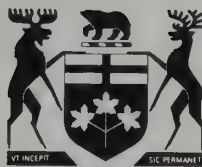
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# ONTARIO LABOUR RELATIONS BOARD REPORTS

August 1985



Ontario



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# ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1985] OLRB REP. AUGUST**

**EDITOR: NIMAL V. DISSANAYAKE**

Selected decisions of particular reference value are  
also reported in *Canadian Labour Relations Boards  
Reports*, Butterworth & Co., Toronto.

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**0986-85-R** Teamsters Union Local No. 938, Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Data Security Limited**, Respondent, v. Group of Employees, Objectors

Certification - Petition - Supervisor ceasing involvement in petition after parties agree to exclude him as management - Whether gap created by his failure to testify rectified by oral evidence - Employer questioning of individual employees not involving intimidation - Board satisfied petition resulted from employees' earlier concerns about unionization - Vote directed

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *A. Grant* and *L. Collins*.

**APPEARANCES:** *Eric del Junco* and *L. Myles* for the applicant; *Michael Hines* and *Ted Butcher* for the respondent; *Glenn W. G. Giles* for the objectors.

**DECISION OF THE BOARD;** August 30, 1985

1. This is the continuation of an application for certification.

2. The Board has found the description of the appropriate bargaining unit to be all employees of the respondent in the City of Scarborough, Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

3. As the Board noted in its August 9th, 1985 decision, the Board has before it a numerically relevant statement in opposition, or "petition", filed by employees in this matter. In fact, as high as the percentage was of employees who signed cards for the Union, a similarly high percentage of employees subsequently signed the petition opposing the granting of certification. Given the overlap, the Board indicated that it would follow its normal practice of seeking the confirmatory evidence of a representation vote, provided it had reason to believe that the "petition" represented a voluntary change of mind on the part of the employees in question. And in that regard, the Board is in accord with counsel for the applicant that the onus of persuading the Board that the evidence supports such a conclusion is on the petitioners.

4. Following the events of the initial hearing on August 9th, a number of petitioning employee-drivers came forward at the hearing the following week to testify as to the circumstances under which the petition came to be signed. The bulk of that evidence was given by driver Glenn Giles, who had volunteered to represent the petitioners in place of Jeff Dodds (whose position will be discussed below). The business of the company is to provide daily transport and storage of sensitive magnetic financial data. Mr. Giles' evidence is that the employees signed up for the Union over a very short period of time (there are 12 employee-drivers in the unit), and that they immediately began to discuss amongst themselves the consequences of what they had done, in particular the consequences of a possible strike on the company's business, and thus on their jobs. So acute was the concern amongst the employees that the Union, according to one of the Union's own supporters and witnesses, arranged for a meeting to take place the Sunday before the Board's Notice of Application was even posted, to try to calm everyone down and clear the air. As the Union's witness, Mr. Myles testified, "I guess at that point everyone had a question in his mind" about the impact of what they

were doing. At that meeting the Union's staff organizer answered any inquiries that the employees had, and explained that unless a petition were circulated amongst the employees, the Union would be certified on the basis of the cards that the employees had signed. Mr. Myles testified that when the meeting was over, he no longer heard any concerns being voiced, and that in fact by that time two employees who had appeared to be "shaky" had come on board. Mr. Giles, however, was also at the meeting, and gave a credible account in his own testimony, preceding Mr. Myles', of how a number of the drivers left the meeting in the elevator together. He testified that the talk in the elevator was still over the potential impact of a strike on the company's relationship with the customers, and Mr. Giles testified that the drivers at that point agreed amongst themselves that they would not under any circumstance allow the Union to take them out on strike.

5. When the Board's Notice ("green sheet") was posted in the workplace the next day, the debate over the issue of unionization intensified. Mr. Feeney, the Operations Supervisor, was anxious to know what it was that had provoked the employees into bringing in a Union, and called a friend of his in management elsewhere for advice. Mr. Feeney's friend told him that he "guessed it was okay to talk to the employees about the application for certification, so long as he did not seem to push them in one direction or another, or talk about how the decision could affect them personally". So Mr. Feeney called a number of employees into his office, one by one, and, according to Mr. Feeney, simply asked them what it was that had prompted the application for certification. Mr. Myles was one of those employees called in, and basically confirmed in his evidence that that was what Mr. Feeney asked. Mr. Myles added that Mr. Feeney also reminded him that the company had to provide uninterrupted service to its customers 365 days a year, but beyond that, testified that Mr. Feeney spent most of the time "beating around the bush", and appeared to avoid answering any of Mr. Myles' questions. That was on Monday.

6. On Wednesday of that week, with everyone openly discussing the question of the Union, the "Officer Manager", Mrs. Mead, attempted to arrange a meeting after work at which her husband (who does not work for the company) would be present to explain in full the "pro's" and "con's" of having a Union. Mrs. Parsons, the company's "Sales Manager", is also reported to have been discussing this meeting with employees in the parking lot, reminding them, as Mr. Feeney had, of the company's obligation to provide 365-days-a-year service. While neither Mrs. Mead nor Mrs. Parsons have a significant number of employees working under them, Mr. Giles readily conceded that the people in the office are viewed as having a "pipeline" to management, and had a petition surfaced at that meeting, the Board would have difficulty giving it any weight. Many of the employees were already scheduled to participate in a league baseball game that night, however, and the meeting with Mrs. Mead's husband never did take place.

7. Meanwhile, discussion of the Union amongst the employees continued. Mr. Giles testified that employees were talking about the possible impact of a strike, the possibility that the company might lock the employees out, and the possibility of law suits against the company if it could not honour the delivery "guarantees" in its contracts. Mr. Giles attributed the first consideration to general talk amongst the drivers, the second as "probably" coming from the people in the office (although he only heard it from other drivers), and the third one to his own view of what the company's legal liability might be. A doubt also was present as to whether it really would be up to the employees themselves whether to call a strike or not.



8. On Thursday Jeff Dodds approached the various drivers at the end of the day and asked them to meet at the Hickory Tree restaurant across the street to discuss "the matter at hand". The meeting took place after shift-end at 5 p.m., and supposedly before the start of the next shift at 5:30, but it is clear that the 2 afternoon employees left the meeting about a half hour late for their shift. One of those employees is a "supervisor" however, and it is not apparent that there is any other supervision present on that second shift. The essential point raised by Mr. Dodds was that he had been one of three employees designated a year previously to go to the company's president, Ted Butcher, to discuss the possibility of improvements in the wages and conditions of employment. Mr. Butcher could give no commitment at that time, but asked the three to come back and talk to him in a year. Mr. Dodds pointed out that the application for certification came just as the year was up, and asked the other employees whether they did not want to give the company a chance first. Mr. Giles testified that the bulk of the employees had been employed for less than a year, and were unaware of the agreement with the company. He testified that a number of employees had felt the company president would be very busy and unapproachable, but when they saw how he reacted to the application for certification, began to think they may have gone about things the wrong way. Specifically, Mr. Giles testified that the employees were impressed by the way Mr. Butcher's attitude had not changed towards them even after the application for certification, continuing to speak cordially with them at the shop and baseball games. "If it were me and my business", Mr. Giles explained, "I'd have been really ticked off".

9. At the end of the Thursday meeting, the employees voted to sign a petition putting off certification. Mr. Dodds had no petition prepared, so the employees in favour of that move signed a piece of paper in blank, with Mr. Dodds explaining what would go on it. Mr. Giles asked to see the paper before it went to the Board the next day, and satisfied himself that what he had signed was what he expected. Mr. Giles had no knowledge of how Mr. Dodds actually got the petition to the Board.

10. Viewing the evidence as a whole, the most compelling feature from the Board's point of view is the irresistible conclusion that a very high degree of uncertainty and retrospection began to emerge amongst the employee complement immediately after the applicant's organizing campaign had taken place, and well before the events of the week in which the petition actually surfaced. This is borne out clearly by the evidence of the Union's chief witness, Mr. Myles. Indeed, it appears that the whole purpose of the Sunday meeting was to attempt to deal with these misgivings, and it was at that meeting that the notion of a "petition" was first introduced. On the evidence, we are satisfied that the apparent "change of mind" amongst employees in this case was spontaneous, and not something initiated by management.

11. Mr. Feeney used very bad judgment in calling employees in as he did to ask them about their decision to unionize, but he did not tell them anything that, from the evidence, they had not figured out already, and Mr. Myles' evidence bears out the fact that Mr. Feeney's handling of the interviews was a good deal less than intimidating.

12. The absence of a preamble when employees signed the petition obviously creates a potential problem for the petition, but not one that cannot be cured by compelling oral evidence. For cases reflecting the Board's more liberal approach concerning such oral evidence since the direction of the Court in *Re Fisher et al (Fuller's Restaurant)*, [1980] 28 O.R. (2d)

462, see *Baltimore Aircoil*, [1982] OLRB Rep. Oct. 1387; *K-Mart Canada Ltd.*, [1983] OLRB Rep. April 561. Mr. Giles was a credible witness and testified that he verified the message on the petition before it was sent in. Beyond that, the Union has been made aware by the Board of the preamble on the petition, and Mr. Myles, who testified without concern over it, was at the meeting at which it was signed.

13. That brings us to the issue of Mr. Dodds, one of the “supervisors”, as well as to a second “supervisor”, Mr. Richardson, who was also involved with the petition. That position was agreed at the first day of the hearing to be the first line of managerial exclusion. These “supervisors” or “co-ordinators” are drivers who were promoted to that position in March of this year, and given the responsibility for the work of two or three drivers each. If one of those drivers is absent on a day, the “supervisor” must find a replacement or drive for him. As the Board noted in its August 9th decision, when Mr. Dodds was advised that he had been agreed between the company and the Union to be excluded, he promptly withdrew from his role as a spokesman for the objecting employees. He advised the Board, however, that he had viewed himself as one of the drivers at the time he became involved in the petition.

14. The evidence supports that view. The applicant itself applied for certification of all employees save and except *the Operations Manager*, and the evidence before us demonstrates that other persons who had been made “supervisors” were part of those approached by the applicant to support its campaign. Mr. Dodds himself, in the applicant’s letter of charges dated August 7th, is described as “sub driver Jeff Dodds”. And once again the candid evidence of Mr. Myles tends to verify that Mr. Dodds was not being viewed on the question of unionization as a management spokesman. Rather, Mr. Myles testified that he perceived Mr. Dodds’ main concern at the meeting to be to honour the commitment that had been made to Mr. Butcher the year before.

15. In light of the turn of events and Mr. Dodds’ reaction at the first hearing, where Mr. Dodds was advised that he had just been agreed to as the first line of exclusion, it is not surprising that Mr. Dodds did not appear at the second hearing to testify - leaving a gap, for example, as to what was done with the petition after the Hickory Tree meeting, and the manner in which delivery of the petition was made to the Board. As the parties were advised at the hearing, however, there were sufficient signatures collected on the petition at the Hickory Tree meeting alone to reduce the applicant’s unqualified membership evidence below 55 per cent. The Board’s concern with the full custody of the petition is to satisfy itself that the petition was not being so loosely displayed that employees would fear its contents were likely to come to the attention of management, and feel themselves compelled to sign as a result. See, e.g. *Weston Bakeries*, [1979] OLRB Rep. Dec. 1309; and *Fuller’s Restaurant*, [1980] OLRB Rep. Sept. 1289. Any loose handling of the petition in the present case, as well as the delivery of it to the Board, would have occurred only after the signing of the petition by the relevant number of employees, and could not retroactively affect the voluntariness or otherwise of those prior acts of signing. There was, in addition, no evidence before the Board as to the handling of the petition after the critical meeting such as would, in the face of Mr. Dodds’ absence from the hearing being itself understandable, create concern for the Board in this particular case.

16. The Board accordingly exercises its discretion under section 7(2) of the Act to seek the confirmatory evidence of a representation vote. Any concerns or misunderstandings which

still exist in the minds of employees can thus be addressed in the context of the election campaign. All employees of the respondent in the bargaining unit described in paragraph 2 as of the date hereof who have not been discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

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**0451-85-R** International Union, United Automobile, Aerospace & Agricultural Implement Workers, of America, (U.A.W.), Applicant, v. D.G.M. - **Dominion General Manufacturing Limited**, Respondent

Membership Evidence - Inexperienced implant organizer granting bona fide loan of dollar - Form 9 declarant making proper inquiries and declaration - Other cards of collector not affected by isolated incident of bona fide loan

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members I. M. Stamp and S. O'Flynn.

**APPEARANCES:** Louis Gottheil, Clare Meneghini, Ken Hunter and Mohinder Singh for the applicant; Scott Thompson, Devin Sidhu and Gail Langley for the respondent.

**DECISION OF THE BOARD:** August 12, 1985

1. By decision of the Board (differently constituted) dated July 12, 1985, the Board determined that there should be a further hearing, as a result of the initial investigation by a Board Officer, with respect to a non-pay allegation pertaining to John Helm.

2. Accordingly, the Board heard evidence from the three persons noted in the July 12 decision, namely, John Helm, Ken Hunter and Clare Meneghini. At the conclusion of the testimony and the representations of the parties, the Board ruled orally that, *inter alia*, the Board was prepared to at least count the membership cards collected by Hunter other than Helm's card. That ruling is set out in full *infra*. The Board intends to first set out the findings of fact and submissions of the parties in somewhat more detail.

3. Having weighed and assessed the testimony of the witnesses, including their relative credibility, the Board makes the following findings of fact. Meneghini, an experienced full-time union organizer, followed his usual procedure with respect to the organizing drive at the respondent company. On Wednesday, May 22, 1985, Meneghini met with the two in-plant organizers (Hunter and one other), explained the procedures involved in certification, including specific details as to the proper method of collecting membership cards. The necessity of collecting one dollar payment from each employee wishing to join the union was stressed. A target number of cards was set. In fact, that target was reached the next day. A second meeting was held between Meneghini and the organizers that Thursday. Meneghini checked that



the money corresponded with the number of cards and that the cards themselves were properly completed. Meneghini closely questioned the organizers as to where and how the cards were collected. Both organizers replied to the questions and assured Meneghini that the one dollar payment had been collected from each member. Meneghini also conducted a spot check of cards, i.e., specifically querying the in-plant organizers about the exact details respecting randomly selected cards. Meneghini delivered the certification application to the Board by hand on May 24; the Form 9 was filed on the terminal date.

4. When the no-pay allegations were raised in the respondent's reply, Meneghini immediately insisted on another meeting of the organizers. This time, Meneghini went through each name on the membership list seeking a precise account of where and when the card was signed and whether the one dollar was collected. Meneghini continued to receive positive assurances. Meneghini repeatedly stressed the seriousness of the non-pay allegations. He then asked if the one dollar payment had been borrowed in any case. Finally, Hunter, one of the two in-plant organizers, although not the chief organizer, acknowledged that in one instance, namely Helm's card, he had loaned the one dollar to Helm. Hunter recounted the details of that transaction. Meneghini instructed Hunter to get the one dollar immediately and promptly inform Meneghini that the one dollar had been collected. On June 13, Thursday, Hunter telephoned Meneghini confirming that the one dollar had been repaid. Meneghini then filed the amended Form 9 setting out the details of the one dollar loan and repayment.

5. The details of the Helm's card were as follows. Hunter approached Helm in the company cafeteria on Thursday, May 23, shortly before the 8:00 shift start. Hunter asked if Helm was interested in joining the union. Helm agreed but stated that he didn't have the one dollar. Hunter replied that, if Helm didn't tell anyone, Hunter would lend him the one dollar. Hunter then handed over one dollar and Helm returned the one dollar and signed the membership card. In fact, two one dollar bills crumpled together were handed over and returned although both Helm and Hunter intended the loan to be one dollar. Helm testified that he felt obligated to repay the one dollar as he regarded the money as a loan. Hunter, too, regarded the one dollar as a loan to be paid back. The loan was actually repaid, as noted, on June 13 when Hunter stated that he needed the money and Helm handed over the one dollar. Hunter acknowledged that he had been told not to lend the one dollar but considered the loan to be a private matter between himself and Helm. Hunter said he did not regard what happened as illegal or underhanded although he now realized that his action was a serious impropriety. Finally, Hunter stated the Helm transaction was the only occasion on which he lent the one dollar payment and that this was his first organizing campaign.

6. Counsel for the applicant conceded that the one dollar payment had not actually been collected on the date the membership card was signed. However, counsel submitted the one dollar loan was *bona fide*, was repaid and constituted an isolated instance. Further, counsel argued Hunter was not a paid union official but an inexperienced in-plant organizer. Meneghini, it was submitted, had conducted proper enquiries prior to filing the first Form 9 and, when the non-pay allegations were raised, investigated further, disclosing his findings on the amended Form 9. Counsel submitted that, according to the Board's jurisprudence, even Helm's card could be counted in the circumstances but, at least, the remaining membership cards collected by Hunter need not be disregarded. Finally, counsel argued that if all Hunter's cards were not counted and a representation vote ordered, the ballot box should be sealed pending resolution of the section 8 application. A number of cases were referred to in support: *Frankel Steel Limited*, [1984] OLRB Rep. Jan. 28; *Tillsonburg Shoe Co.*, [1964] OLRB Rep.

June 142; *Webpax Limited*, [1967] OLRB Rep. Jan. 792; *Federal Bolt & Nut Corporation Limited*, [1966] OLRB Rep. May 108; *St. Thomas Sanitary Collection Service Limited*, [1972] OLRB Rep. June 600; *Skene Cartage Company Limited*, [1966] OLRB Rep. April 30; *William H. Rorer (Canada) Limited*, [1973] OLRB Rep. Sept. 483; *Robert Cruikshank Cleaning Contractors Limited*, [1972] OLRB Rep. Oct. 891; and *Webster Air Equipment Company Ltd.*, 58 CLLC 18,110.

7. Counsel for the respondent submitted the applicant bore the onus with respect to verifying its membership evidence. Counsel argued, firstly, that whether the Helm's transaction was a loan or a gift was not free from doubt. Even if that transaction was viewed as a loan, counsel asserted that the Board had the discretion as to whether to count the other cards collected by Hunter. It was contended those cards should be disregarded as Hunter had intentionally concealed the "loan" initially, had repeatedly given false assurances to Meneghini about the one dollar payment and had been less than fully candid with the Board. In summary, counsel asserted a representation vote should be directed.

8. The Board made the following oral ruling:

The Board has considered the submissions of the parties and reviewed the evidence. The Board is satisfied that the one dollar payment with respect to Helm's membership card was a *bona fide* loan from Hunter to Helm. That is, Hunter intended the one dollar as a loan to be repaid, Helm was clearly personally known to Hunter, Helm acknowledged the one dollar as a loan to be repaid and did, in fact, repay Hunter. Further, the Board notes that Hunter was not a union official or an experienced organizer. Indeed, this was Hunter's first organizing campaign. The Board is satisfied that Meneghini, as signatory to Form 9, conducted the appropriate, even, extensive inquiries, with respect to the cards. Moreover, those inquiries had followed a detailed explanation of the organizing process. On balance, then, the Board finds that the loan to Helm was an isolated case. The Board has the discretion to determine the precise effect of its finding of a *bona fide* loan regarding Helm's membership card. In the circumstances, the Board need not resolve the issue as to whether Helm's card itself should be counted or disregarded. That is, the Board is not prepared to discount the other membership cards gathered by Hunter. And, therefore, the Board is satisfied that the applicant has filed membership evidence in excess of fifty-five per cent of the employees in the bargaining unit. In view of this finding, the Board need not deal with the applicant's submissions with respect to the sealing of the ballot box should a vote be directed.

9. To recapitulate the finding of the Board in the July 12 decision, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on June 4, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act in respect of a bargaining unit described as all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, quality control manager and office and sales staff.

10. Accordingly, a formal certificate shall issue to the applicant.
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**0981-85-R** United Food and Commercial Workers International Union, Local 175, AFL, CIO, CLC, Applicant, v. **Dunnville Hydro-Electric Commission**, Respondent

**Certification - Practice and Procedure - Parties agreed on unit description - Outcome of dispute as to confidential/employee status of individual not affecting unit description of union's certifiability - Final certificate granted with clarity note re person in dispute - Parties left to bargain about person's status or to refer under s.106(2)**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *F. W. Murray* and *W. F. Rutherford*.

**APPEARANCES:** *Douglas J. Wray*, *Gail Midanik*, *Mattie McKay*, *John Hurley* and *Rick Vickers* for the applicant; *James T. Cowan* and *Tom E. Fidler* for the respondent.

**DECISION OF THE BOARD;** August 2, 1985

1. The name of the respondent is amended to read: "Dunnville Hydro-Electric Commission".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. During the course of the hearing into the application, the parties agreed that the appropriate bargaining unit should be described as follows:

all employees of the respondent in Dunnville, Ontario, save and except foremen and persons above the rank of foreman.

The parties did not agree, however, whether Janice Hoffman, who is referred to by the respondent as clerk, secretary to the office manager, should be included in or excluded from the bargaining unit described above. The respondent takes the position that she is employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the *Labour Relations Act*. The applicant takes the opposite position.

5. Whether Janice Hoffman ultimately is included in or excluded from the bargaining unit cannot alter or affect in any way the description of the unit. The bargaining unit to which the parties have agreed is literally an all-employee unit in that it includes clerical (inside) employees and skilled and semi-skilled (outside) employees. If Janet Hoffman is not employed



in a confidential capacity in matters relating to labour relations, she is an employee under the Act and would be included in the agreed unit described above. If she is employed in a confidential capacity in matters relating to labour relations, she is not an employee within the meaning of the Act and cannot be included in the unit no matter how it is described. In either event, it would be unnecessary to alter the bargaining unit description to which the parties have agreed.

6. For that reason and having regard to the agreement of the parties, the Board finds that all employees of the respondent in Dunnville, Ontario, save and except foremen and persons above the rank of foreman, constitute a unit of employees appropriate for collective bargaining.

7. Furthermore, while the resolution of that issue affects the specific number of employees who would be in the unit on the date of the application, regardless of whether she is included or excluded, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on July 26, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. Since the Board has been able to determine the unit of employees that is appropriate for collective bargaining as required by section 6(1) of the Act and has been able to ascertain the number of employees in the bargaining unit and the number of employees in the unit who were members of the trade union at the times required by section 7(1) of the Act, the Board has discharged its obligations under those sections. That being the case, the Board clearly has jurisdiction to issue a formal certificate to the applicant pursuant to section 7(3) of the Act.

9. In the hearing, the Board advised the parties that the formal certificate would issue and that a Board Officer would be authorized to inquire into and report to the Board on the duties and responsibilities of Janice Hoffman. On reflection, in circumstances such as the instant case, where the Board has a clear jurisdiction to issue a formal certificate and does so, notwithstanding the existence of a remaining issue under section 1(3)(b) of the Act, it is not appropriate for the Board to appoint a Board Officer to inquire into the issue. One effect of the formal certificate issuing is to put the parties in a position where they are legally entitled to give notice to bargain. Once notice has been given, they have a statutory duty under section 15 of the Act to bargain in good faith and make every reasonable effort to make a collective agreement. The question of whether Janice Hoffman should be included in the bargaining unit is a subject about which the parties can bargain. If they are unable to resolve the question, either one can make application under section 106(2) of the Act which provides:

If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

In the circumstances, the Board will not authorize a Board Officer to inquire into the duties and responsibilities of Janice Hoffman.

10. For purposes of clarity, the Board declares that, until such time as the issue of

whether Janice Hoffman is employed in a confidential capacity respecting labour relations matters is resolved, she is not included in the bargaining unit described above.

11. Having regard to the foregoing circumstances, a formal certificate will issue to the applicant.

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**0113-84-U William Egan, Complainant, v. International Brotherhood of Painters and Allied Trades, Local 1590, Respondent, v. Ontario Hydro, Intervener**

**Unfair Labour Practice - Union Security - Union trial board imposing fines on member - Terminating membership and seeking dismissal from employment upon failure to pay fines - Term "other assessments" in s.46(2)(g) including any monetary claim by union against member - Quantum not only factor in determining reasonableness of assessment - Fine levied through unreasonable process as personal vendetta against member contrary to s.46(2)**

**BEFORE:** *D. E. Franks*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

**APPEARANCES:** *William Egan* for the complainant; *A. M. Minsky, Q.C., L. Steinberg* and *R. J. Last* for the respondent; *Ross Dunsmore, Tony Mollica* and *Don Lavt* for the intervener.

**DECISION OF D. E. FRANKS, VICE-CHAIRMAN, AND BOARD MEMBER I. M. STAMP;** August 15, 1985

1. The name of the respondent is amended to read: "International Brotherhood of Painters and Allied Trades, Local 1590".

2. This complaint under section 89 arises out of a previous file, Board File No. 2837-83-M which is the referral of a grievance to arbitration pursuant to section 124 of the Act. In that grievance the Ontario Allied Construction Trades Council seeks to have the complainant in this matter, Mr. William Egan, terminated from his employment with Ontario Hydro. In the present complaint Mr. Egan is seeking the protection of section 46(2) of the Act with respect to those proceedings. It will be noted that Mr. Egan's employer, Ontario Hydro, intervened in these proceedings. Although the employer would normally not be a party to a section 89 complaint alleging a violation of section 46(2) in circumstances of the present case, the Board allowed the employer to participate in these proceedings. As we have pointed out, these proceedings affect the grievance filed against Ontario Hydro and in any event, as we shall see, this case concerns Mr. Egan's conduct as a foreman for the intervener Ontario Hydro.

3. Ontario Hydro and the respondent are parties to a collective agreement between the Ontario Allied Construction Trades Council and the Electrical Power Systems Construction Association which contains *inter alia* a union security clause which provides as a condition

of continued employment that foremen maintain their union membership in good standing (see article 11.1(b) of the Master Portion). On December 12, 1983 Mr. Egan was sent a letter by Mr. Ronald Last, Business Manager of Local 1590 which reads as follows:

We wish to confirm that under Section 119(a) of the International Union's Constitution, you have been dropped from the roll of Local 1590. As you are well aware, you have refused to pay the fine of \$1,000.00 levied against you by the Trial Board on April 21st, 1983 and, for that matter, the fine of \$1,500.00 (sic) levied by the Trial Board on May 17th, 1983. For that reason, the Union was unable to accept your dues and check-offs forwarded to this office by Ontario Hydro and we refer you to Section 172(e) and (f) of the Constitution.

We wish to give you one last opportunity under Section 119(a) of the Constitution to re-apply for membership in the Union which you may do by paying the following amounts to this office within 14 days of the date hereof per Section 119(b) of the Constitution, namely,

1. A Bond of \$1,000.00 to be placed with Local 1590 for a period of one year - 1,000.00
2. Amount of Fines - 2,500.00 (sic)
3. Amount of Initiation Fee and Reinstatement Fee - 00.00
4. Monthly Union Dues 6 months x \$14.50 - 7.00
5. Monthly assessments 2% of Gross Income - 60.84

Total \$4,347.84

We wish to give you fair and final warning that if you do not re-apply for membership in Local 1590 and pay the above amounts within 14 days of the date of this letter, we shall have no alternative but to seek your dismissal from employment by Ontario Hydro in accordance with the Collective Agreement binding upon Local 1590 where it is a condition of employment, as you know, that all employees must be members of and continue to maintain their membership in good standing in Local 1590.

In reality, the fine prescribed by the May 17th Trial Board was \$2,250.00. At issue in the present case are the fines and penalties levied by the two Trial Boards referred to in the above letter.

4. It is the contention of the complainant in this matter that the fines levied by the Trial Boards which he has not paid and as a consequence of which his membership in the respondent trade union has been terminated, constitute activity from which Mr. Egan is protected by section 46(2) of the *Labour Relations Act*. Section 46(2) reads as follows:

No trade union that is a party to a collective agreement containing a provision mentioned in clause (1)(a) shall require the employer to discharge an employee because,

- (a) he has been expelled or suspended from membership in the trade union; or
  - (b) membership in the trade union has been denied to or withheld from the employee.
- for the reason that the employee,
- (c) was or is a member of another trade union;
  - (d) has engaged in activity against the trade union or on behalf of another trade union;



- (e) has engaged in reasonable dissent within the trade union;
- (f) has been discriminated against by the trade union in the application of its membership rules; or
- (g) has refused to pay initiation fees, dues or other assessments to the trade union which are unreasonable.

That is, it is Egan's contention that the fines levied which he has refused to pay fall within the phrase "initiation fees, dues or other assessments to the trade union which are *unreasonable*".

5. Mr. Egan and the Trial Boards of Local 1590 are no strangers to this tribunal. Indeed, the present case really starts at a time when Mr. Egan and the respondent were before this Board in another case, Board File No. 2407-81-U. Egan had alleged in that complaint that the Trial Board of Local 1783 which was at the time being merged with the present respondent Local 1590 had violated section 80(2)(b) of the Act in imposing certain fines against Egan. The Board's decision in that matter issued on February 7, 1983, in the course of which the Board revoked one of the two fines which had been levied against Egan by the 1783 Trial Board. The first incident which gives rise to the first Trial Board fine in the present case occurred on January 11, 1983 almost a month before the Board's decision in the previous case was made public.

6. The incident occurred at the sandblast shop at Ontario Hydro's Bruce "A" Generating Station. Egan is the foreman of that shop. Ronald Last, the business manager of Local 1590 and an accredited union representative under the collective agreement was visiting the job site on that day. Last had conducted business elsewhere on the site and also had union business to conduct in the sandblast shop. Although the exact details of the incident are in dispute, it is clear that Last went into the sandblast shop and collected a number of the members of the respondent union together to conduct some union business, such as handing out Certificates of Qualification. It is also clear that he made no attempt to inform Egan of this and, indeed, Last's position at the hearing in this matter was that once he was accredited he did not need to tell Egan that he was in the shop. Egan in turn ordered Last out of the shop. There is no need to go into the details of the exchange or for this Board to make a finding on what actually happened. It is sufficient to say that the exchange was probably quite heated given the animosity between Last and Egan resulting from the then current Board proceedings. It appears that Egan threatened to call security and have Last removed from the site at which point Last left the sandblast shop.

7. On January 19, 1983 Ron Last as business manager grieved the incident to Ontario Hydro pursuant to the collective agreement alleging a violation of clause 7.1 of the Master Portion relating to the accredited union representative on the job. We would note in passing that Mr. Last's position that he did not need to inform Egan that he wanted to speak to Egan's crew, apart from being uncivil does not make very good labour relations sense and is probably not a reasonable interpretation of clause 7.1. In the circumstances, one would have thought that notwithstanding Mr. Last's right of access it would only make good labour relations sense to inform a foreman that one had union business which one was entitled to conduct at a time when one is obviously disturbing the progress of work in the shop.

#### Article 7

#### ACCREDITED UNION REPRESENTATIVES

7.1 The senior representative of each Union will designate local union representatives as

Accredited Union Representatives to handle the day-to-day administration of this Agreement on the basis of not more than two representatives from each Union for each Project and a suitable number for each Lines and Stations Construction Zone. The Council will notify the General Manager of EPSCA in writing of the names of such Union representatives, or alternates in the event of illness or unavailability, so that they may be issued identification cards to permit entry to the site. Such representatives, after identifying themselves to the EPSCA representative upon entering the job site, will be free to observe the progress and conduct of the work and to conduct normal union business. The Council undertakes that these representatives will not hinder or interfere in any way with the said work.

It appears that the result of that grievance was a warning to Mr. Egan not to become involved in any confrontations with Mr. Last during any subsequent job site visits by Last.

8. The matter, however, did not end with the filing of the grievance. Subsequently, on March 28, 1983 Last laid certain charges against Egan pursuant to the constitution and by-laws of the respondent. Egan was sent a letter dated March 30, 1983 advising him that a Trial Board would be held on April 21, 1983 in Sarnia. The letter was signed by David Last, Recording Secretary, and Brother of Ron Last and enclosed a copy of the charges made by Ronald Last the business manager. The charges by Mr. Ronald Last read as follows:

I, Ronald Last, wish to charge William Egan, a member of Local 1590, of the International Brotherhood of Painters and Allied Trades ("the Brotherhood"), with violating the duties and obligations of members of the Brotherhood pursuant to its Constitution ("the Constitution"). In particular, Brother Egan:

- (a) has conducted himself in a manner unbecoming a member of the Brotherhood, contrary to Section 245(a) of the Constitution;
- (b) has conducted himself in a manner that was abusive of fellow members and officers of Local Unions, contrary to Section 245(10) of the Constitution;
- (c) has violated Trade Union Rules promulgated in accordance with the Constitution. In particular, he has violated Clause 11(c)(3) of Local 1590's By-Laws;
  - (i) interfering with an elected officer and business representative in the performance of his duties;
  - (ii) failing to render assistance and support to be [sic] elected officer and business representative in the performance of his duties; and
  - (iii) failing to adhere to the terms and conditions of the pertinent collective bargaining agreement,

and also Clause 12(d)(11) of the By-Laws by rushing, driving, intimidating and using foul language towards a Brother Member;

- (d) has engaged in activities which tend to bring a local of the Brotherhood and the Brotherhood itself into disrepute and which tend to reflect adversely upon its good name, standing and reputation, contrary to Section 245(13) of the Constitution;
- (e) has conducted himself in a manner inconsistent with the duties, obligations and fealty of a member of the Brotherhood, contrary to Section 245(16) of the Constitution.

The basis of these charges is that on or about Tuesday, January 11, 1983, at the Bruce "B" Generating Station project, in the sandblast shop, Brother Egan refused to allow me,

the properly accredited representative of the Brotherhood, to enter the job site and conduct normal union business. In fact, Brother Egan went so far as to call the security representative of the employer to have me removed from the job site. All of the foregoing is contrary to the right of an accredited representative of the Brotherhood pursuant to Article 7.1 of the collective agreement binding upon the Brotherhood and the Employer.

Accordingly, I ask that these charges be processed pursuant to the Constitution and Brother Egan brought before a Trial Board as soon as possible.

9. That Trial Board was set for April 21, 1983 but before it met there was another confrontation at the sandblast shop between Egan and Last on April 12th. We will return to this incident later in this decision but it appears to have been similar to the first incident, although perhaps not as intense a confrontation. Nevertheless, it also led to a grievance against Ontario Hydro concerning Egan's conduct. That grievance was dated April 12, 1983 and filed April 18th by solicitors for the respondent local. As a consequence of that second grievance Mr. Egan was suspended from employment for three days by the intervener Ontario Hydro. Mr. Egan was advised this on April 19, 1983; that is, before the Trial Board sat to hear Last's complaint on the first incident.

10. The Trial Board for the January incident met on April 21st as indicated. Prior to the Trial Board, Egan wrote to the local on April 7th asking that certain members of the local be called as witnesses, that he be permitted to attend with legal counsel, that transcript by an independent stenographer be obtained and that the trial be delayed for two weeks. It appears, however, that Egan had no intention of attending the Trial Board hearing and indeed, rather than attend, sent the Trial Board chairman a letter to be read in his absence. Subsequently, on May 9, 1983 he was sent a transcript of the Trial Board proceedings. The following is the record of the Trial Board proceedings with some unessential details deleted:

The Trial Board of Local 1590 composed of the following members:

John Daly Chairman  
David Last Recording Secretary  
Ernie Wilkins Vice President  
Don Kampstra Treasurer  
Pete Booth Trustee  
Larry Miller Trustee  
Jack Warner Trustee

convened at 8:00 p.m. on Thursday, April 21, 1983 in the Pipefitters Union hall at 1151 Confederation Street, Sarnia, Ontario.

Brother Ron Last requested that we delay the proceedings for fifteen (15) minutes as Brother Bill Egan had not arrived yet.

After the fifteen (15) minutes delay the Trial Board convened to hear the charges laid by Brother Ron Last against Brother Bill Egan. Brother Egan still had not arrived. Chairman John Daly took notice that Brother Egan had received proper notification according to Section 248 of the Constitution.

Brother John Daly then read the charges that Brother Ron Last had laid against Brother Bill Egan.

Brother John Daly then read a sealed letter from Brother Egan outlining Brother Egan's defence that had been mailed to the Recording Secretary Dave Last. Brother Ron Last explained to the Chairman there had been typing errors in the charge sent to Brother Egan.



Local Union 1590,  
International Brotherhood of Painters and Allied Trades.

The Chairman,  
Trial Board Convened April 21, 1983  
Case of LAST Vs. EGAN.

Mr. Chairman,

In the matter of those charges brought before you by Mr. Ron LAST in his capacity of a representative of the Brotherhood:

I enter a plea of "Not Guilty".

My defence in this matter is as follows.

1. On January 11, 1983 I was not a member of Local 1590 as stated by Mr. LAST to representatives of Ontario Hydro.

2. The place of these alleged offences against Mr. LAST does not exist. There is no "sandblast shop at Bruce "B" Generating Station project" as contained in the complaint.

3. The date, January 11, 1983 on which these alleged offences took place, and the ensuing time between laying of the complaint March 28, 1983, a total of 77 days, does not constitute a reasonable time under the Constitution of the Brotherhood, in which to lay those charges.

You are requested to enter this answer into the record of the hearing.

William Egan,  
P. O. Box 221,  
TIVERTON, Ontario  
NOG 2T0

This letter will be entered into the record as exhibit #1.

The question of Brother Egan not being a member of Local 1590, Brother Ron Last explained to the Trial Board that Brother Egan was working as a Foreman at Bruce "A" in charge of four (4) or five (5) painters, therefore, he would have to be covered under the EPSCA Agreement and our Constitution and By-laws.

At 8:30 p.m. the Chairman agreed to the request by Brother Ron Last that the hearing commence without the Defendant being present because his letter indicated his plea of "not guilty".

At this point Chairman John Daly asked Brother Ron Last to proceed to give evidence concerning the charges he laid against Brother Egan. Brother Ron Last produced a copy of a letter signed by our Canadian Director Dave Cairns appointing him the designated Representative to Douglas Point, also, an Identification Card from Ontario Hydro.

Brother Ron Last then outlined his reasons for going to Douglas Point. The reasons and his day activities were as follows:

On January 11, 1983 I arrived at Douglas Point and went to Bruce "B". I went to the Chief Steward's lunch room arriving at 9:50 a.m.

• • •

After leaving the Training Centre we went to Bruce "A" arriving around 1:30 p.m.

We went to the Stencil room to speak to Brothers Archie Smith and Jagelewski to give them their Cards of Qualification, Agreements and explained the difference of the five (5) cents per hour.

We then walked over to the Sandblast booth and Spray booth. We were talking and explaining the five (5) cents per hour to Brothers Bob Lawson, Brian Cavers and Don Keeshig when Brother Egan came rushing in and told my Chief Steward Lin Indoe to get out and take him with you.

I replied to Brother Egan telling him I did not have to get out as Tony Clayton gave me full permission to be here.

Brother Egan then ordered Brothers Cavers, Keeshig and Lawson back to work in a very hostile way. I tried to tell Brother Egan that I have every right to be in that Sandblast shop because of the EPSCA Agreement and also Tony Clayton (General Foreman) had given me full permission. But, again, Brother Egan ordered me out, or, he would call Security. I told him I don't give a damn who you called. He again, ordered the Painters back to work in a very loud voice.

I called Brother Don Keeshig back to give him the rest of the Painters Qualification Cards. Brother Keeshig started to walk towards me. I was going to walk towards him when Brother Egan stepped in front of me and slightly bumped my shoulder to prevent me from walking to Brother Keeshig. I took one step back and walked around Brother Egan. Brother Egan came to Brother Keeshig ordering him to get back to work. Brother Keeshig tried to explain that he had to take the Qualification Cards to the lunch room because they would be ruined in the Blast shop. Brother Egan ordered the Painters back to work very loudly!

At this point I told all the Painters to return to work so they would not be harassed by Brother Egan.

Then, Brother Egan went to the office to call Security. My Chief Steward and myself stood and watched the Painters perform their duties.

Within ten (10) minutes Security arrived. Brother Egan told Security who I was, then, told the Guard I was not allowed in the shop, that I was to be removed. I gave the Guard my Business Card and showed him my Pass which allows me on that site. I then asked the Guard if he was ordering me out of the Plant. He said, "no, I am not, I am asking you to go to Personnel Office and get this problem straightened out".

At this time my Chief Steward and myself left to see Don Laut at Personnel. Don Laut assured me this problem will be straightened out.

Brother Ron Last requested to the Chair to call Brother Indoe as a witness.

Brother Ron Last asked the following questions to Chief Steward Lin Indoe at Douglas Point:

• • •

Q. - Would you explain what happened?

A.- We arrived at the Blast shop around 1:35 p.m. after talking to the Painters in the Stencil room at Bruce "A". We were talking to Brother Don Keeshig, giving him his

Card of Qualification and explaining the rates of pay when Brother Egan came barging in and ordered me to get out and take him with you. We tried to explain we had Tony Clayton's permission, but, he just kept telling us to get out or he would call Security. Also he was ordering all the Painters back to work repeating this order several times. He was very excited and loud. Business Manager Ron Last called the day Steward Brother Don Keeshig back to give him his Card of Qualification. Brother Egan stepped in front of Brother Ron Last and bumped his shoulder trying physical [sic] to prevent Brother Last from talking to Brother Keeshig. (Demonstration of bump was showed to the Trial Board). Brother Ron Last stepped around Brother Egan and walked over to Brother Keeshig. Brother Egan then went to his office threatening to call Security. Security arrived shortly after Brother Egan told the Guard who Brother Last was and that he was to take him out of the Blast shop. Brother Last asked the Guard if he was ordering him out. The Guard said, "no, I am only asking you to go to Personnel and get it straightened out"!

We then left and went to Don Laut's office.

Brother Ron Last then asked the Chairman to call Brother Keeshig as a witness.

Brother Ron Last asked the following questions:

• • •

Q. Did you hear Brother Egan order Brother Ron Last and Brother Lin Indoe out of the Sandblast shop, or he will call Security?

A. Yes, I did and Bill was very excited, waving his arms around and ordering us back to work very loudly.

Q. Did you see Brother Egan bump me?

A. No, I was behind him when he stepped in front of you and could not see any contact.

Q. Did Brother Egan say anything to you after my Chief Steward and myself left?

A. Yes he did, he told me if I did not get to work when he orders me, to [sic] that I will see the bad part of Bill Egan.

There being no more witness or questions Brother Ron Last gave his summation.

Brother Ron Last explained that under the By-laws of Local 1590 every member and including Foremen must cooperate with the Business Manager in performing his duties, sections 11-3 of Local 1590's By-laws, but, Brother Egan chose not to. Not only did he call Security to remove his Business Manager from doing his normal Union Business, he went as far as to physically bar him from talking to the members of Local 1590, even though the physical part was only slightly he did not conduct himself in a way that is becoming to a member of the Brotherhood. Brother Egan also went so far as to intimidate, abuse and embarrass his Business Manager as Section 12 D-11 of Local 1590's By-laws states he must not do. Brother Egan also violated the EPSCA Agreement, Article 7.1 says, an accredited Representative of the Union may observe and conduct normal union business during his visit to the job site, but Brother Egan chose to call Security and prevented the Business Manager from conducting his normal union business and to observe the progress and conduct of the work.

Mr. Chairman and Trial Board members with the evidence and the witness testimony, I think there is substantial evidence for Brother Egan to be found guilty as charged.

We, the members of the Trial Board of Local 1590 find Brother Bill Egan guilty of all charges laid against [sic] by Business Manager Ron Lasts.



The Trial Board fines Brother Egan one thousand dollars (\$1,000.00) plus he must place a bond with Local 1590 of one thousand dollars (\$1,000.00) for a period of one (1) year to be returned if no further violation. Also Brother Egan will be barred from all meetings with no voice or vote for a period of five (5) years. The reason we feel these penalties are proper are it has been proven to this Trial Board that Brother Egan physically denied the Business Manager the right to perform his duties. Brother Egan also not only harassed the Business Manager he also embarrassed the entire Brotherhood by calling Security. We will not tolerate this type of conduct towards our Business Manager and Stewards or any other member of Local 1590.

Also we would like to have it put in the record, that, in the future if Brother Bill Egan conducts himself in this matter he will be dealt with more severely.

We have reproduced these minutes of the Trial Board because counsel for the intervener made certain observations and arguments arising out of the minutes of the Trial Board concerning the conduct of the trial by the respondent trade union. Thus, one notes that while Ron Last is the charging party in the proceedings, his brother David Last as recording secretary is also one of the Trial Board members. Counsel for Ontario Hydro suggested that that was totally improper. Counsel also noted that the charges as given to Egan and on which he chose not to appear, place him at another job site to Bruce "B" rather than Bruce "A" where the sandblast shop is and that no notice was given to Egan that the charge would be changed to relate to Bruce "A" rather than Bruce "B" which was pleaded as a defence by Egan.

11. The first Trial Board took place on April 21, 1983. However, as we have noted, by April 18th Last had already filed additional charges against Egan for the events of April 12, 1983. That being the case, the final warning concerning future misconduct is questionable. The recording secretary, David Last would have had the charges already and one can reasonably question whether this is a warning to Egan or simply a statement that the outcome of the next trial had already been anticipated. The charges of April 18th are identical to the charges of March 28th except that they refer to the incident on Tuesday, April 12, 1983 at the Bruce "A" Generating Station project in the sandblast shop. Again Egan was sent a copy of the charges by David Last and informed that this trial would be held on May 17, 1983. That trial was indeed held and again Egan did not attend, he simply wrote a letter to Ron Last entering a plea of not guilty. On June 2nd Egan was sent a transcript of the Trial Board proceedings, from which we will quote in part:

Brother Ron Last explained that he went to Personnel Office to notify Dave McKee (Personnel Officer) that he would be on the project for most of the day and that he would also be visiting Brother Egan's job. Dave McKee asked Brother Ron Last his purpose to visit Brother Egan's job site? Brother Ron Last explained his reasons, which Dave McKee agreed with. Brother Ron Last stated that there was a discussion with Dave McKee about Brother Egan's conduct towards him the last time he visited Brother Egan's job site. Dave McKee thought it would be a good idea to call D. Bonikowsky, Superintendent, so he could call Brother Egan and tell him not to interfere with Brother Ron Last when he arrived. Brother Ron Last agreed.

Brother Ron Last also stated that when he arrived at the Sandblast yard he spoke to sub-foreman Brother Archie Smith and gave him some of the Beneficiary cards to have filled out.

Brother Ron Last then went to the Sandblast and Spray shop to get Brothers Bob Lawson and Ron Jenkins telephone numbers. Brother Ron Last stated that he had just finished receiving Brother Lawson's telephone number when Brother Egan came barging in and ordered him out of the shop.

Brother Ron Last stated that he was not leaving, that under the EPSCA Agreement he had the right to observe the progress of the job and to conduct normal Union business (sub-section 7:01).

Brother Ron Last stated Brother Egan ordered him out of the shop three (3) or four (4) more times which Brother Ron Last states he ignored Brother Egan who then made a statement, "I'll fix you".

Then Brother Egan left the Blast shop.

Brother Ron Last then produced to the Trial Board letters dated April 19, 1983 and April 21, 1983 from D. Bonikowsky, Superintendent, disciplining Brother Egan because of his conduct and disregard towards Brother Ron Last and the EPSCA Agreement. (Exhibit #1)

With the absence of Brother Egan, Chairman Daly asked Brother Ron Last to give his summation.

Brother Ron Last explained that under the By-laws of Local 1590 Section 11-3 and Section 12-D-11 that the members of Local 1590 must cooperate with the Business Manager in the performance of his duties.

Brother Egan chose not to.

Also members must conduct themselves in a way that is becoming a member of the Brotherhood.

Brother Egan also violated the EPSCA Agreement Article 7:01 by interfering with an accredited Representative of the Union and by doing so, has violated our constitution.

Mr. Chairman and Trial Board members:

It appears to me Brother Egan wish not to live within the By-laws and the Constitution of the Brotherhood. The letter from D. Bonikowsky disciplining him proves without a doubt of his guilt in violating the By-laws, the Constitution and the EPSCA Agreement.

There being no more evidence or defence the Trial Board asked Brother Ron Last to leave the room so they could examine the evidence and come up with a decision.

We, the Trial Board of Local 1590 find Brother Bill Egan guilty as charged by Business Manager Ron Last. We fine him two thousand two hundred and fifty dollars (\$2,250.00) plus no voice or vote and non-attendance of meetings for a period of five (5) years. Also, if any further violations of the Constitution, By-laws or the Agreement he will be dealt with more severely.

It is thus clear from the two Trial Board proceedings that Egan has been fined \$1,000.00 plus required to post a \$1,000.00 bond as a result of the first Trial Board of April 21, 1983 and fined \$2,250.00 and no voice or vote or admission for a period of five years as a result of the Trial Board of May 17th. It falls to this Board to determine whether these fines fall within section 46(2)(g) as being other assessments to the trade union which are "unreasonable".

12. Counsel for the respondent takes the position that the phrase "other assessments" in 46(2) does not cover fines. He argues that "assessments" are in fact "levies" which are universally claimed by unions against all members and that individual levies such as fines do not fall within the term "other assessments". With the greatest of respect we cannot agree with counsel that the term has such a narrow meaning. The term is part of a fairly long and complicated subsection of the Act which deals with individual union members and the conduct of the union in relation to individual union members. In this regard clause (g) speaks to "initiation fees, dues or other assessments" and we propose to give that a broad enough

interpretation to include specific levies against individuals. In our view the correct reading of the phrase “initiation fees, dues or other assessments” in clause (g) relates to any monetary claim by the union against the specific individual member seeking the protection of section 46(2). If the phrase were limited to deal only with payments sought from every person then the requirement of “reasonableness” would be quite meaningless since it will be a total answer to say that everybody is paying and that therefore it is not unreasonable when directed against this individual. It is our view that the section is broad enough to deal with fines levied against an individual just as, for instance, it is broad enough to deal with the specific initiation fee levied against a particular individual or a particular dues assessment levied against a particular individual.

13. Counsel for the respondent argues that the only issue over which this Board has jurisdiction under section 46(2) is the quantum of the fines. He points out correctly that the evidence did not address the quantum. Thus, although the fines are steep, Mr. Egan is in a well-paying job and is *able* to pay the fines and in that sense the fines cannot be said to be unreasonable. With the greatest of respect to counsel for the respondent we cannot accept such a narrow interpretation of clause (g). It may very well be that the size of a fine, in and of itself, would entitle the Board to determine that the fine was unreasonable. For example, a hundred thousand dollar fine against an individual by a trade union might on its face be said to be totally unreasonable. On the other hand, the largeness of a fine may in turn be justified by a trade union. It is, for instance, not uncommon for trade unions, where members have crossed the picket line, to subsequently fine the members to the extent of their earnings while crossing the picket lines. This may in turn be a substantial amount of money. However, the union can justify the imposition of such a large fine by saying that the member who crossed the picket line and did not support a strike should not be in a better position than those that did not cross the picket line and, therefore, the excess monies earned can be taken away as a fine by the union levied against its member. Accordingly, we are of the view that although the quantum of the fine is a major component assessing its reasonableness or unreasonableness it is not solely determinative of that issue.

14. Rather, we are of the view that in assessing the reasonableness or unreasonableness of a fine levied against a member the Board is entitled to look at the context in which the fine is levied, thus the Board is entitled to examine whether “the punishment fits the crime”. Clearly, if a large fine is the result of a trivial offence it is open to the Board to say that the fine levied is unreasonable within the meaning of section 46(2)(g). Similarly, an unreasonable process might lead to a finding that the fine is not reasonable. In the present case the conduct of Ron Last and the two Trial Board’s which levied the fine against Egan can only be interpreted as a blatant attempt to get rid of Egan. As we have noted, both instances resulted in penalties being imposed by the employer (a warning followed by a suspension for the second offence). Both penalties were instituted by the trade union. The charges by Last, over an interpretation of the collective agreement which can best be regarded as silly, (that he doesn’t have to inform a foreman that he wants to talk to his crew) lends a sense of unreality to the charges brought by Last against Egan. This sense of unreality is heightened by the allegation that “the stature of the whole brotherhood” is brought into disrepute by an argument between Egan and Last. That these should result in substantial fines, the consequence of which would be a refusal by Egan to pay, can only lead to the conclusion that the purpose of the charges was in fact to drive Egan out of the trade union, and from his job at Ontario Hydro. To do this by levying an unreasonable fine against a member is precisely what section 46(2)(g) of the Act speaks to, and it is conduct of the trade union from which Egan is entitled to be protected.



15. For the foregoing reasons, therefore, we find that the complainant, William Egan, has refused to pay fines which are assessments which are unreasonable within the meaning of clause (g) of section 46(2) of the Act, and he is therefore entitled to a remedy under that section. Accordingly, we direct that the respondent trade union cease and desist from requiring the intervener Ontario Hydro to discharge Mr. William Egan from employment because of his refusal to pay those fines insofar as those fines have led to his termination or suspension from membership in the respondent trade union.

16. In closing, we cannot help but refer back to the decision of the Board referred to at the beginning of this decision. At paragraph 37 the Board noted:

The Board is constrained to not leave this matter without commenting about the evidence which it heard relating to the conduct of the complainant William Egan towards the former and present officials of Local 1783 and some of its members. There is little room for doubt that his conduct exceeded the bounds of reasonable dissent and, to say the least, bordered on harassment. In the Board's view, Egan has been the author of his own misfortune. In other circumstances, similar conduct by him towards his union might be unprotected by the Act.

While it may be that Egan has brought about his own misfortunes, we feel very strongly that that does not entitle Mr. Last or the executive of the respondent union to conduct a vendetta against Mr. Egan. A trade union has a duty under the statute to represent its members and although this case deals with a very narrow point, there ought to be no room for the kind of personal vendetta conducted by Last against Egan as we have seen in the present case. Several times in his evidence Mr. Last commented "I don't have to be a cheat to get him". In our view "getting people" is not proper activity for a trade union to be engaging in.

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE;**

1. I dissent from the majority decision for the following reasons.

2. I take issue with the majority's determination that the term "other assessments" in section 46(2)(g) includes fines. The majority suggests that the language should be given a broad reading. In my view that conclusion conflicts with the Board's general pre-disposition to avoid interfering in internal union affairs unless this is clearly mandated by the Act. Admittedly section 46(2) does provide the statutory authorization for the Board to consider some matters which could otherwise be characterized as internal union affairs. If the Board, however, adopts an expansive reading of the provisions of section 46(2) this can only lead to more frequent and wide ranging incursions into an area it has wisely avoided in its earlier jurisprudence. This is precisely what the majority invites when it suggests that the Board is prepared to review not only the quantum of the fine but also the *process* by which the fine is determined. Both of these are matters which should be left to the Courts to review. Even if I was prepared to accept the proposition that the Board should review the reasonableness of fines, in my opinion the majority decision provides little in the way of setting out factors which are likely to influence a reasonableness determination, either as a matter of quantum or of process.

3. The majority chooses to characterize the events leading up to the assessment of fines

against Mr. Egan as a “personal vendetta” conducted by Mr. Last, the business agent of the union and the executive. Reference is made to the conclusions drawn by a previous panel hearing a complaint brought by Egan; that panel noted that Egan was the “author of his own misfortune.” While I would not deny the fact that the fines levied against Egan were substantial, it is clear that his conduct in his dealings with Last was exceptionally abrasive and provocative to the extent that he was warned by Hydro concerning future interactions with Last. In addition, Egan has displayed an ongoing contempt for the entire trial process. He declined to attend either of the proceedings before the Trial Board and he has not exercised his right of appeal under the union’s constitution. Egan’s conduct towards the union and its representatives cannot be justified. Finally, Egan has been able to utilize the provisions of section 46(2)(g) to avoid not only the sanctions imposed by the union but also the obligation under the collective agreement to remain a member of the union in good standing.

4. It is my position that this application should be dismissed and the union should have been allowed to proceed with its section 124 application against Hydro.

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**0846-85-M** Labourers’ International Union of North America, Local 183, Applicant,  
v. **Ellis-Don Limited**, Respondent

Construction Industry - Construction Industry Grievance - Practice and Procedure -  
Sector Determination - Labourers union filing grievance - Ironworkers and Carpenters seeking  
intervention claiming work covered by ICI provincial agreement - Board deferring grievance -  
Listing hearing for sector determination

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *R. Wilson* and *J. Wilson*.

**APPEARANCES:** *B. Fishbein* and *R. Lotito* for the applicant; *B. W. Binning*, *Brian Foote* and *Leonard Finegold* for the respondent; *S. Ursel* and *Stan Arsenault* for International Association of Bridge, Structural & Ornamental Ironworkers, Local 721; *Douglas J. Wray* and *Frank Rimes* for Toronto District Council of the United Brotherhood of Carpenters and Joiners of America.

**DECISION OF THE BOARD;** August 15, 1985

1. The applicant has referred a grievance in the construction industry concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The applicant, Labourers’ International Union of North America, Local 183 (“the union”) alleges that the respondent Ellis-Don Limited (“Ellis-Don”) has subcontracted work to companies which are not in contractual relations with the union or has refused to subcontract work to companies which are in contractual relations with the union. The grievance which has been referred to the Board describes the work as “... forming, reinforcing steel placing,

concrete placing and finishing ...” at Ellis-Don’s project at Yonge Street and Hendon Avenue in the City of North York. The relief sought by the union includes, amongst other things, a direction that Ellis-Don sublet forming, reinforcing steel placing, concrete placing and finishing work only to companies in contractual relations with the union and damages by reason of the alleged violation of the collective agreement between them. It is uncontested that Ellis-Don first entered into a collective agreement with the union in 1983 and was bound to a collective agreement (hereinafter referred to as “the Agreement”) at the making of this application.

3. The reply filed by the respondent through its solicitors contends that the Board is without jurisdiction to entertain this application because the work in question is work in the industrial, commercial and institutional (ICI) sector of the construction industry and, therefore, cannot be work coming within the scope of the agreement. In support of its contention, the reply states that the project is not in the residential sector; Ellis-Don is bound to provincial agreements pertaining to the ICI sector respecting labourers, carpenters and rodmen; and, accordingly, Ellis-Don is applying to the Board pursuant to section 150 of the Act for a determination of whether the work in question is work within the ICI sector of the construction industry.

4. The International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (“the Ironworkers”) has filed an Intervention, Construction Industry, requesting that the Board adjourn the application in order to allow the Ironworkers to file a complaint under section 91(1) of the Act. In so doing, the Ironworkers are alleging that the root issue in the grievance is a dispute over the assignment of the work. In support of its request, the Ironworkers’ intervention states that the Ironworkers and Ellis-Don are bound to the provincial agreement pertaining to the ICI sector with respect to rodmen; the work in question, that is the placing of reinforcing steel, has been subcontracted by Ellis-Don pursuant to the subcontracting provisions of the rodmen’s provincial agreement to companies in contractual relations with the Ironworkers; and the union is claiming that work should have been sublet to contractors in contractual relations with it.

5. The solicitors for the Toronto District Council of the United Brotherhood of Carpenters and Joiners of America (“the Carpenters”) also have advised the Board that the Carpenters wish to intervene in this matter on the grounds that the Board should, preliminary to hearing the application, make a determination under section 150 of the Act.

6. At the hearing into the application, as a result of the foregoing pleadings, the Board heard the full submissions of the parties with respect to the issues raised by those pleadings, particularly whether the Board should first make a determination under section 150 of the Act before hearing the application on its merits. The conclusions set out hereunder are made by the Board having reviewed and considered those submissions.

7. The project involved with this application is comprised of two office towers, one of which has been built and the other which is still to be built, some low-rise buildings which include self-contained apartments and several levels of underground parking. That much is common ground amongst the parties. Counsel for the applicant told the Board that all floors of the low-rise buildings are to be occupied by self-contained apartment units, with no provision for commercial space. The submissions of counsel for Ellis-Don and for the Carpenters make it unclear whether there are three or four stories to the low-rise buildings. They are agreed that the first floor is designated for commercial use. The only question is



whether there are two or three floors of apartments. A similar uncertainty exists with respect to the underground parking facilities but there are between three and five levels of underground parking under the entire project. It would appear that the two office towers and the low-rise buildings will occupy a common site.

8. The clauses in the Agreement on which the union has based the grievance are:

ARTICLE 1 - RECOGNITION - CO-OPERATION  
- CONTRACTING OUT

1.01 The Employer recognizes the Union as the Collective Bargaining Agent for all of its own construction employees, (whose classifications fall into a category listed on Schedule "A" attached hereto), engaged in the on-site construction of all types of apartment buildings only and their natural amenities, and without restricting the generality of the foregoing, and for the purposes of clarification, it is agreed that the following building types shall be deemed to be an apartment building for the purposes of this Agreement;

- (i) all Public Housing, Co-operatives, Senior Citizens' and Student Housing;
- (ii) a stacked row dwelling, which means a building divided vertically into three or more dwelling units and horizontally into four or more dwelling units, each having its own private entrance;
- (iii) a stacked structure which is four storeys or more above grade;
- (iv) notwithstanding items 1.01(i) and 1.01(ii), a traditional three-storey building with common corridors, stairwells, and parking;
- (v) a separate structure which includes space designed to be used for commercial, retail and/or office purposes of not more than 50 per cent (50%) of the gross floor area (excluding parking and recreational facilities);
- (vi) those sections of a multi-towered single complex on a common podium which are divided vertically by lines relating directly to commercial and residential sections; then each section shall be built according to its base use.
- (vii) a separate residential structure(s) which forms part of a single project with an apartment building(s) under a common deed, architectural design and building permit.
- (viii) structures used for sleeping accommodation and/or occupancies in which persons, because of age, mental or physical limitations, require special care or treatment; and all facilities connected therewith.
- (ix) the other paragraphs of this Article 1.01 notwithstanding the term 'apartment building' when used in this Collective Agreement shall not include low rise housing as that term is defined in the Collective Agreement between the Toronto Housing Labour Bureau and the Labourers' International Union of North America, Local 183.

1.03 Should the Employer sublet the following work:

• • •

- (ii) Concrete Superstructure;
- forming

- reinforcing steel placing
- concrete placing and finishing

...

then such work shall be sublet to companies in contractual relations with the Union.

9. The union opposes the Ironworkers' and Carpenters' attempts to intervene and the requests of the respondent, Ironworkers and Carpenters to defer hearing the grievance on its merits until the Board has made a determination under section 150 of the Act or decided a work assignment dispute under section 91. The union takes the position that its grievance involves an interpretation of the Agreement for purposes of determining whether the work in question is encompassed by the description of apartment building construction in clause 1.01 and, if it is, whether the contractor to whom Ellis-Don let the work is in a contractual relationship with the union. Since that is a private matter between Ellis-Don and the union as parties to the agreement, the Ironworkers and Carpenters have no direct, legal interest and therefore no status to intervene in the grievance. Even if the Board were disposed to permit the Ironworkers and Carpenters to intervene for the limited purpose of dealing with the preliminary issue, counsel submits that the Board should not defer proceeding on the merits of the grievance on three grounds. First, the purpose of section 124 of the Act is to expedite the resolution of grievances in the construction industry and they should not be subjected to delays caused by protracted hearings under section 150, particularly where the Board has found the work in question to be work in the residential sector when a similar question was litigated before the Board by the union. Second, the Board has previously held that the subcontracting of work does not constitute an assignment of work, therefore there is no basis for the Ironworkers' claim that the grievance is an attempt to disguise the existence of a work assignment dispute. Third, Ellis-Don should be estopped from raising the defence that the Agreement contravenes the Act if in fact the work in question is work in the ICI sector and is encompassed by clause 1.01 of the Agreement because by advancing that defence Ellis-Don would be seeking to rely on its own unlawful conduct of signing a collective agreement which contravenes the Act.

10. In the Board's view, the circumstances of this case are not proper ones, in which to apply estoppel. If clause 1.01 of the Agreement covers work in the ICI sector and if, as asserted, both the union and Ellis-Don are bound by the Labourers provincial agreement, the Agreement would be unlawful to the extent that it covered work in the ICI sector. Since the Agreement cannot be binding in law to the extent that it purports to apply to the ICI sector, it cannot have the effect of exerting estoppel against the Act. Furthermore, to the extent that the Agreement is unlawful, the union is a party along with Ellis-Don to that illegality. It would seem to the Board, therefore, that the union would be seeking to rely on its own unlawful act by relying on clause 1.01 in raising the defence of estoppel. Therefore Ellis-Don is not estopped from raising the potential illegality of the Agreement as a ground for seeking to have the Board make a determination under section 150 of the Act as to whether the work at issue is work in the ICI sector.

11. Section 150 provides as follows:

The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

12. There can be no question that Ellis-Don has status to request the Board to make a determination under section 150, so it is immaterial whether the Ironworkers or the Carpenters have status to do so. Nonetheless, the Board finds little merit in the union's claim that the Ironworkers and Carpenters do not have even limited status in these proceedings to raise a question under section 150 of whether the work claimed by the union to be the subject matter of its grievance is work within the ICI sector. The work in question is concrete forming construction. Ellis-Don, the Ironworkers and Carpenters all assert that Ellis-Don is bound together with them to the provincial agreements for rodmen and carpenters, respectively. The Ironworkers and Carpenters assert further that the reinforcing steel work and carpentry work associated with forming has been done on the project to date by contractors bound to and performing such work under their respective provincial agreements, which agreements legitimately pertain to work in the ICI sector. The union was in precisely the same position as the Ironworkers and Carpenters when it sought successfully to intervene in a section 124 referral brought by the Carpenters in *West York Construction*, [1980] OLRB Rep. Jan. 119 (hereinafter referred to as *West York #1*). The union was seeking also an adjournment of the grievance until it could file a complaint respecting a work assignment dispute under what is now section 91 of the Act. In that case, as in the instant one, it was the respondent who was requesting that the Board make a determination under section 150 (then section 135). In *West York #1*, the Carpenters as applicant and the union as intervener acknowledged to the Board that it would have to decide whether the work in question was work in the ICI sector. They did not want the Board to make the decision in a section 150 proceeding, however. The Carpenters wanted the determination made in the context of its section 124 proceeding and the union wanted it made in the context of a proceeding under section 91 of the Act. The Board, in concluding that the case was an appropriate one for making a determination under section 150 stated:

8.

• • •

In these circumstances, we are satisfied that it would be appropriate to accede to the respondent's request and determine the issue of whether the work in question comes within the industrial, commercial institutional sector pursuant to the provisions of section [150].

9. Because of the particular issues raised by this case, we are of the view that the issue of whether the work comes within the industrial, commercial and institutional sector should be determined under section [150] of the Act prior to a consideration of any other issues relevant to the grievance and before considering the section 81 complaint in File No. 1661-79-JD. In our view, this approach is likely to prove to be the most expeditious manner of proceeding.

13. By the time the Board dealt with the merits of that case under section 150, it had been consolidated with a similar case involving a different contractor as a respondent to another grievance filed by the Carpenters in which the union successfully intervened on similar grounds to those in the *West York #1* case. The union was relying in both cases on collective agreement language very similar to that of clause 1.01 of the Agreement. The work involved was forming work and the projects were mixed-use, residential and commercial. The Board ultimately found the work on both projects to be work in the residential sector. The fact situation confronting the Board was such that the Board was prepared to give considerable weight to evidence that, in the Toronto area, the parties had a practice of treating certain kinds of mixed-use structures as being either in the ICI or residential sectors based on a majority use test. It is clear from



the Board's decision in *West York Construction Ltd.*, [1983] OLRB Rep. Dec. 2132 (hereinafter *West York #2*) that the majority test was only persuasive in the particular fact situation of that case and that the Board was under no obligation to follow that test in other fact situations. The union was referring to the *West York #2* decision when it claimed that it had already successfully litigated before the Board the work in question in the instant case by obtaining a declaration that the work was in the residential sector.

14. The Board is not convinced that the determination in *West York #2* would result in a similar determination in this case. It is at least arguable, as the respondents, the Ironworkers and Carpenters contend, were the Board to give considerable weight to the majority use test in the circumstances of this case, it might conclude that the work was in the ICI sector. Furthermore, *West York #2* was concerned with work on a project coming within item (v) of clause 1.01 of the Agreement. The respondent's submissions imply that, in order for the union to be successful, it would have to establish the project in the instant case to be under item (vi) of clause 1.01. The Board has not previously dealt with the status of that kind of work in a section 150 determination. The Board has previously indicated its willingness to make a determination under section 150 of the Act in circumstances where the status of the work in question has not previously been litigated before the Board. In that respect see the Board's decision in *Sword Contracting Limited*, [1985] OLRB Rep. May 743.

15. Section 146(2) of the Act prohibits the union and Ellis-Don from "... concluding any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement ...." Ellis-Don is said to be bound to the labourers, rodmen and carpenters provincial agreements to which the union, the Ironworkers and Carpenters are bound respectively and which are said to cover concrete forming work in the ICI sector. Therefore, to the extent that clause 1.01 of the agreement encompasses such work, the union and Ellis-Don might be contravening section 146(2) to the extent of that overlap.

16. Having regard to the potential illegality of the agreement and to the similarity between this case and *West York #1* in the circumstances under which the requests arose for a determination to be made under section 150, the Board is satisfied for the same reasons given in *West York #1* that this is an appropriate case in which to grant the respondent's request for a determination under section 150 of the Act. The question to be determined is whether forming, reinforcing steel placing, concrete placing and finishing work at Ellis-Don's project is work in the ICI sector of the construction industry. The Board is not persuaded by the union's submissions that in making such a determination, the Board will simply be re-litigating the status of work already found by the Board to be work in the residential sector.

17. The issue of whether the work comes within the ICI sector is central to the merits of the union's grievance. That was the situation in *West York #1*. Therefore the Board proposes to adopt a procedure similar to the one set out in paragraph 10 of that decision. It will relist this matter for hearing for the purpose of receiving the evidence and representations with respect of whether the work of forming, reinforcing steel placing, concrete placing and finishing at Ellis-Don's project at Yonge Street and Hendon Avenue in the City of North York comes within the ICI sector of the construction industry. The parties who will have status to present evidence and representations on this issue will be any trade union, council of trade unions, employer or employers' organizations having a direct connection with the project. A Board Officer is authorized to meet with the parties to assist them with identifying those parties

which will have standing to participate in the proceedings and to report to the Board on the extent of agreement or disagreement respecting which parties should have standing. See the Board's decision in *Harbridge and Cross Ltd.*, [1979] OLRB Rep. April 313.

18. When the issue of whether the work in question is work within the ICI sector has been determined, this application will be listed again for hearing with respect to the remaining issues raised by the grievance. At that stage, the parties to the proceedings will be the Labourers' International Union of North America, Local 183 and Ellis-Don Limited.

19. This matter is referred to the Registrar for the appointment of the Board Officer and for listing for hearing, in each case for the purpose referred to in paragraph 17. Notices of Hearing are to be sent to all trade unions, councils of trade unions, employers and employers' organizations which are agreed by the parties or found by the Board to have a direct connection with Ellis-Don's project at Yonge Street and Hendon Avenue in the City of North York.

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**2018-84-OH C. Douglas Sproule, Complainant, v. Frankel Steel Ltd., Respondent**

**Health and Safety - Whether quit or termination - Employee narrowly escaping injury not complying with directions to continue work - Not expressly stating safety concern - Magical words not necessary to exercise right to refuse where reason obvious**

**BEFORE:** *D. E. Franks*, Vice-Chairman, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

**APPEARANCES:** *David Nicholson*, *Joe Ginty* and *Douglas Sproule* for the complainant; *Terry Souter*, *Dill Evans* and *Elwin Kargus* for the respondent.

**DECISION OF D. E. FRANKS, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; August 27, 1985**

1. This is a complaint that the respondent has dealt with the complainant, Mr. Sproule, contrary to section 24 of the *Occupational Health and Safety Act*. The respondent takes the position that Mr. Sproule quit his employment. The complainant takes the position that he was constructively dismissed and that he was given no choice but to go to work in a job which he felt was unsafe and that further the constructive dismissal in effect ignores his right pursuant to the *Occupational Health and Safety Act* to refuse to perform work which he feels is unsafe. What is clear from the evidence is that the present complaint arises from a great deal of confusion and misunderstanding on everybody's part.

2. The event which gives rise to this case occurred on September 18, 1984 when the complainant, Mr. Douglas Sproule, and another employee, Mr. Elwin Kargus, were assigned to move some steel beams from the respondent's shop to an area at the back of the shop where they could be moved out to be painted. The complainant had been working in the respondent's

shop for a couple of weeks. The other employee he was working with, Mr. Kargus, had worked for the respondent for a number of years. Specifically, the beams in question were about eight feet long and weighing in the order of 150 pounds and were being transported by means of a hoist and a beam picker attached to the center of the beam.

3. The evidence as to what actually happened while Mr. Sproule and Mr. Kargus were transporting this beam is in conflict but it is not necessary for us to determine what specifically led to the beam falling from the beam picker. For our purposes, the critical thing is that at some point in maneuvering this beam the beam fell from the beam picker and crashed to the shop floor. It appears that at this point both Sproule and Kargus blamed each other for the beam falling. Thus, when Mr. Dill Evans, the shop manager of the respondent, arrived on the scene what he witnessed was an argument between Sproule and Kargus about who caused the beam to fall. Evans ordered the two into his office where the argument continued.

4. At this point we should comment that it is clear from Sproule's evidence that notwithstanding the question of who caused the beam to drop Sproule was thoroughly frightened by being nearly hit by this falling steel beam. It is also clear, however, from Mr. Evans' evidence that he did not address the matter that Sproule might be terrified but simply regarded the problem as one of an argument between Sproule and Kargus. Evans thus directed Sproule to return to working with Kargus and Sproule was clearly reluctant to do so in view of the recent incident. Evans instead interpreted this as in effect a refusal by Sproule to obey his direction and accordingly Sproule was terminated.

5. It appears that later that day Sproule complained to the Occupational Health and Safety people concerning the incident and we are of the view that it is a fair assessment that the employer, and in particular Mr. Evans, was surprised that a safety issue was raised. In Evans' view he did not perceive Sproule's concern about working with Kargus as a matter of a safety concern.

6. While we are sympathetic to the problem in this case that no specific reference was made by Sproule to safety when he refused to continue working with Kargus, we are of the view that there are no magical words necessary for an employee to exercise a right under section 23 of the *Occupational Health and Safety Act*. In the present case we are of the view that Sproule was in all likelihood so upset about this steel beam narrowly missing him that he took it as obvious that everyone would understand that that was what he was upset about. The fact that this was not perceived by Mr. Evans as being Mr. Sproule's concern does not deprive Mr. Sproule of the protection to which he is otherwise afforded by the *Occupational Health and Safety Act*.

7. We are therefore of the view that Mr. Sproule is entitled to a remedy in this matter. Mr. Sproule is entitled to be treated as if he were not terminated on September 18, 1984. The parties are directed to meet and resolve the issue of the remedy to be accorded Mr. Sproule. In the event that they are unable to agree we remain seized of that issue.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. I dissent.

2. It seems to me that to come to the majority conclusion requires implicit acceptance of Sproule's version of the events.



3. Evans says he doesn't know which version was correct, nor do we make a finding.
4. We do know that Sproule said to Evans, in the morning "I quit", and that after lunch Sproule came back to Evans and said "I've thought it over and I'm quitting". All this notwithstanding the efforts of Evans to dissuade Sproule.
5. I agree there are "no magical words" but, in this case, Sproule's entire focus seemed to be on Kargus from anything Evans would have been able to fathom and even in the course of our hearing except that by then he had been apprised of the implications of the *Occupational Health and Safety Act*.
6. I think I could go along with reinstatement but without any back pay on the basis that he did after all author his own misfortune. To go beyond that would in my view open the door to requiring employers to be mind readers *vis-a-vis* the *Occupational Health and Safety Act*.
7. Even then, I would have some concern for whoever will be displaced by virtue of the reinstatement because I feel *that* individual *and* the employer have acted in good faith.

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**3293-84-U John Glykis, Complainant, v. Hotel Employees and Restaurant Employees Union, Local 75, Respondent, v. The Four Seasons Hotels Limited (Inn On The Park), Intervener**

**Duty of Fair Representation - Remedies - Unfair Labour Practice - Prior decision finding breach of s.68 by inadequate notice of membership meeting to consider fate of grievance - Ordering consideration by membership with adequate notice - Whether union contravened duty in manner it complied with Board order - Whether complainant entitled to representation by own counsel at union expense**

**BEFORE:** S. A. Tacon, Vice-Chairman.

**APPEARANCES:** Peter Carlisi for the complainant; Kevin Whitaker, Jean-Guy Belanger and G. Pineo for the respondent; Brian P. Smeenk, J. J. Pergant and D. Zimak for the intervener.

**DECISION OF THE BOARD;** August 16, 1985

1. The Board issued a decision, with reasons to follow, dated May 27, 1985, finding that there was no violation of section 68 of the Act. The Board, in that decision, also declined to award costs to either party. Below are the reasons for the May 27 decision dismissing the complaint.
2. It is useful to set out the background to the present complaint. The complainant

first filed a complaint alleging contravention of section 68 of the Act as a result of a decision by the union's executive board and membership not to proceed to arbitration with a grievance against the complainant's discharge from the Inn On the Park. By decision of the Board (Vice-Chairman Murray) dated October 31, 1984, [reported at [1984] OLRB Rep. Oct. 1406], the complaint was upheld on the narrow ground that the complainant, because of inadequate notice, was, in effect, not given an opportunity to present his case to the executive board and membership meetings of the respondent. It is appropriate to set out the following passages from that decision.

16. The recollections of all the material witnesses, Mr. Glykis and Messrs. Pineo, Longe and Marshall, are cloudy on many important aspects and details of conversations, investigations and actions. It appears from the evidence of the union that Mr. Glykis may not have been wrong in his assertions made many times to Mr. Longe that everyone at the hotel did not like him. Unfortunately for Mr. Glykis, there were concrete, indisputable instances where he was rude and abusive with staff and management, and this was the very conduct he was accused of in connection with the guest on October 14, 1984. This type of grievance required the Business Manager, the Business Representative and the membership to take into account the grievor's character and patterns of conduct to assess the likelihood of succeeding at arbitration. Be that as it may, *it is still clear and undisputed that Mr. Glykis, in accordance with the Local's normal practice, was entitled to be present at the Executive and membership meetings to plead his case. Perhaps if he had attended, he could have explained his conduct or dispelled these assessments about his penchant for getting into altercations. He clearly missed an opportunity which he should have had and could have had according to internal union procedures if he had been given clear times and places of these meetings. If the timing of the meetings had been different, then it would be understandable that Mr. Longe would not advise on them specifically. However, common courtesy would have dictated that Mr. Glykis be advised of the rapidly approaching consideration of his grievance. This conduct amounted to gross negligence and I have found on this basis that this is arbitrary treatment and a violation of section 68.*

17. *The remedy in this instance is the extension of an opportunity to Mr. Glykis to attend before both the Executive and membership meetings and present his case, with or without the assistance of his counsel. Should the membership decide to support his arbitration, we order that the time limits of the collective agreement not be used as a defence by the hotel.*

[emphasis added]

3. The complainant was not content with this relief. Before Vice-Chairman Murray, the complainant had sought: an award of costs; that the Board hear and determine the merits of the discharge grievance; that, alternatively, the Board should refer the matter directly to arbitration with a direction that the complainant be represented at that hearing by his own counsel, with costs borne by the union. On receipt of the Board's decision, the complainant sought reconsideration, again seeking the relief just outlined. Vice-Chairman Murray, in a decision dated March 22, 1985, [reported at [1985] OLRB Rep. March 420] dismissed the reconsideration request. It is again useful to refer to portions of that decision.

7. ... I did not grant the complainant's request that he be compensated for the "costs" incurred in his pursuit of the unfair labour practice complaint because it is the Board's general practice, in exercising its remedial powers under section 89, not to grant costs to the successful party. The Board has, in other cases prior to the complainant's, thoroughly canvassed the policy issues involved in this remedial area and has determined that there must be extraordinary circumstances or other overriding policy considerations before costs will be awarded to the successful party in a section 89 complaint (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Comstock Funeral Home*, [1981] OLRB Rep. Dec. 1755 for a fuller statement

of the Board's rulings). Neither of these conditions was present in the complainant's case and it was no different, for the purposes of an award of costs, from the numerous cases in which the Board finds a violation of the Act. It was for this reason that I rejected the request for an award of "costs". Nothing in the letter requesting reconsideration causes me to change this aspect of the decision of October 31, 1984.

8. In requesting that the Board arbitrate the complainant's discharge grievance itself or refer the grievance to arbitration directly, rather than resubmit the grievance for consideration by the union executive and membership, counsel is again merely repeating the submissions made at the hearing. The Board has stated on numerous occasions that success in proving that section 68 has been breached does not automatically confer on the complainant the right to have his grievance arbitrated (see, for example, *Massey-Ferguson*, [1977] OLRB Rep. April 216; *Bedard Girard*, [1981] OLRB Rep. Oct. 1338). Where the Board does grant such a remedy, the Board, in normal circumstances, does not assume the task of arbitrating the grievance itself because of the longstanding policy of deferring to the arbitration process of the collective agreement where such process will yield a complete remedy (see *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). In this case the loss to the complainant resulting from the contravention of section 68 of the Act was the deprivation of the opportunity to be present at the executive and membership meetings and present his case. As the Board noted at paragraph 16, the complainant "clearly missed an opportunity which he should have had and could have had according to internal union procedures if he had been given clear times and places of these meetings". Therefore, on this basis alone, I do not consider it necessary to change my decision regarding the request for arbitration. In any event, this aspect of the complainant's reconsideration request has been overtaken by events. A copy of a letter dated January 10, 1985, written by counsel for the complainant to the union and forwarded to the Board, indicates that the complainant was provided an opportunity to present his case to the union membership, and that the membership voted to overrule the executive board's decision. As a result, the complainant's grievance was to be referred to arbitration immediately. Even if it could be said that I was wrong in not ordering arbitration, the action of the membership of the union has removed any necessity for the Board to reconsider the adequacy of its remedy of returning the grievance to the normal union procedures as compared with the requested remedy of arbitration.

9. The complainant also requested at the hearing that, if the matter proceeds to arbitration, he should have the opportunity to retain his own counsel to present the arbitration on his behalf. This request has also been repeated in the application for reconsideration. The Board did not see then, and does not see now, any justification for such a claim. *Nothing in the evidence suggests any malice or ill will towards the complainant by officials of the union. The wrongdoing attributed to the union stemmed from "gross negligence". On the contrary, as indicated in paragraph 3 of the Board's decision, the complainant has received the union's assistance without complaint on many previous occasions. The assistance rendered by the respondent following the complainant's termination in October of 1983, though falling below the standard required by section 68, was not tinged in any way by bad faith or active opposition to the grievor himself.* I am not prepared, in the circumstances, to assume that the union will not provide proper representation to the grievor should the matter proceed to arbitration. This is consistent with the Board's jurisprudence. The Board stated in *Phillip Wayne Bradley*, [1983] OLRB Rep. June 865, at paragraph 3:

... Where the Board does grant such remedy [arbitration], it does not always make an order as to representation at such arbitration. The Board has normally specified who must represent the grievor at an arbitration it directs, as a result of a section 68 proceeding, where there are ongoing, serious concerns that the complainant will not receive a non-arbitrary, non-discriminatory, good faith treatment by the [union] in the course of its presentation of the arbitration (see, for example, *Leonard Murphy*, [1977] OLRB Rep. March 146, the first reported decision where such an order is made). When the Board has made an order concerning representation at arbitration, the nature of the order has been that the union and the grievor *jointly* select a lawyer to handle their presentation (see *Leonard Murphy*, *supra*; *Bedard Girard*, *supra*) .... An order for separate, independently selected legal counsel would be highly extraordinary. A remedy under section 68 should not change the essential character of the arbitration process. The



respondent [union] is the party to the collective agreement and the arbitration not the grievor (*General Motors of Canada v. Brunet*, [1977] 2 S.C.R. 537) and would have, except for a violation of section 68, had exclusive selection over whether the arbitration was to proceed and how. The interests of a bargaining agent and the grievor are united before an arbitration board. Jointly selected counsel has been ordered only where the Board feels there would be no truly united representation of the arbitration case for the respondent and the grievor. The joint selection process is to ensure that this unity is restored. The *exclusive* selection of legal counsel would effectively remove the essential unity of the grievor's and union's interests at arbitration.

If indeed the union fails to comply with its duty of fair representation at the arbitration stage, it will expose itself to another complaint before the Board, and the complaint, if proven, will be remedied.

[emphasis added]

10. Finally, the request for reconsideration asks that "the Board remain seized of this particular matter with respect to the arbitration procedure in order that the Board may intervene should the union not fairly represent Mr. Glykis' interests during the course of arbitration". The Board in its decision found a violation of the Act and fashioned a remedy to respond to it. If there is a failure to comply with that order, procedures are available to enforce the Board decision. The Board is not prepared to go beyond this, and remain seized, in order to deal with speculative future violations of the Act. As indicated above, if the union fails to represent the complainant at arbitration in accordance with the duty in section 68, it can be the basis for a separate unfair labour practice complaint. It is unnecessary for me to remain seized in anticipation of possible future breaches of the Act.

4. Prior to the release of the Board's decision with respect to the reconsideration request, the union proceeded to afford the complainant an opportunity to present his case for proceeding to arbitration to the executive board and the general membership meetings, as directed by the October 31 Board decision. These meetings are discussed at length, *infra*. It is sufficient to here note that the membership meeting voted to proceed to arbitration. The complainant, however, still wished to be represented by his own counsel at that arbitration hearing with the costs to be borne by the union. When the union refused that request, the complainant filed the present complaint on March 8, 1985.

5. At the hearing, counsel for the respondent union raised, as a preliminary question, a motion that the complaint should be dismissed as *res judicata*. The Board gave the following oral ruling:

The Board has considered the submissions of the parties with respect to the preliminary motion of the union that the issue is *res judicata*. Without going into great detail, the Board is of the view that the doctrine is not applicable to the instant complaint. Specifically, the complainant alleges that, at the January 8, 1985 meeting of the general membership, the executive board was asked to permit the membership to vote on the question of whether the complainant should be able to have counsel of his choice to represent him at the arbitration hearing but the costs to be assumed by the union. The complainant alleges that the executive board refused that request, not for bona fide reasons, but out of malice or bad faith. It is this decision that the complainant asserts is a violation of section 68 of the Act.

It may well be that the complainant cannot satisfy the onus under section 68 to prove his allegations. It is also true that the remedy requested in this complaint is the same as that argued before the Board in the previous complaint and that remedy was denied in that complaint, as is made clear in the Board's reconsideration of its October 31, 1984 decision. However, the identical nature of the remedy requested is not sufficient to render the doctrine of *res judicata* applicable when new circumstances are alleged as contravening the section 68 duty. The Board, therefore, intends to hear the complaint. The Board, however, wishes to make clear that it will limit this hearing to the allegation that the conduct of the executive board at the January 8 meeting in its alleged refusal to place the "solicitor" issue before the members was in bad faith and, hence, violated section 68 of the Act. The Board does not intend to permit a broadening of the issues to encompass conduct previously dealt with by the Board in File No. 2310-83-U.

The Board does not regard it as necessary to set out the other oral rulings made during the course of the hearing.

6. The complainant called four witnesses: N. Kapelos, solicitor in the original complaint and partner of the present counsel; J. Herdman; J. Glykis, on his own behalf; D. Zimak, director of personnel for the intervener. J. Belanger, local president, testified for the respondent. The Board has considered the usual factors in assessing credibility, including, the consistency of their evidence, the firmness of their memory, the ability to resist the influence of self-interest to modify their recollections, their capacity to express clearly their recollections, their demeanour while testifying, their responses in cross-examination and what appears to the Board to be reasonably probable when the circumstances and the testimony of the witnesses are considered.

7. The Board has some specific comments about the credibility of the witnesses. The Board regards Herdman as a candid witness who testified as to events he observed in a straightforward, honest manner. Similarly, the Board was impressed by the testimony of Belanger. Indeed, the accounts of Herdman and Belanger concerning the January 8 meeting were substantially the same; any minor discrepancies are considered by the Board to be the product of differences in perceptions and recollections which are to be expected when witnesses recount events occurring some months previously. Zimak's testimony was exceedingly brief and did not relate to the issues before the Board. The Board does not consider Kapelos to be a particularly reliable witness, not because of any intention to mislead the Board, but because Kapelos' testimony by and large amounted to a series of conclusions he drew from the events rather than a description of the events themselves. For example, Kapelos repeatedly stated the executive board's decision not to recommend proceeding to arbitration was improper because the board had not offered him the chance to address them again after the executive reviewed the complainant's work record in the context of Kapelos' submissions to the board at the December 14 meeting. Yet, Kapelos conceded on cross-examination that Belanger had not suggested there would be such a second opportunity for further submissions but had said to Kapelos "we'll get back to you and tell you our position, we want to consider this stuff [the work record], this is important". Kapelos' recollection of the January 8 membership meeting was likewise strong on conclusions [e.g., Belanger was arbitrary] but vague on specifics such

as what did Belanger actually say or do. Thus, the Board prefers the testimony of Herdman and Belanger wherever there is conflict with that of Kapelos.

8. The Board now turns to the complainant's testimony. The Board does not lightly find that a witness has deliberately been untruthful. In this case, that conclusion is clearly justified. The complainant testified *after* having heard Kapelos and Herdman give their evidence. It was apparent that the complainant was tailoring his "story" to integrate his version with theirs and deal with any difficulty their testimony, particularly Herdman's, had caused. The complainant was evasive, "didn't remember" or was blatantly self-serving whenever questions on cross-examination touched on matters which showed him in a poor light. For example, the complainant told the membership meeting he wanted his own counsel because he didn't trust the union counsel (A. Ryder, Q.C.) or anyone from that firm because he had lost an arbitration decision in 1981 where he was represented by a junior as Ryder was unavailable at the last moment. When queried as to Arbitrator Teplitsky's express finding in that hearing that the complainant was not a credible witness, the complainant suggested he hadn't really read the award thoroughly and that Arbitrator Teplitsky had in some way acted improperly. The Board could recount additional examples of evasion, selective perception, "tailoring" of evidence and outright fabrication but it is unnecessary to do so. In short, the Board is not prepared to give any credence to the complainant's testimony.

9. Having weighed and assessed the testimony and the relative credibility of the witnesses, as noted above, the Board makes the following findings of fact.

10. Kapelos, counsel for the complainant in respect of the first section 68 complaint, received notice of the executive board meeting of December 13, 1984. Kapelos, the complainant and the complainant's brother attended that meeting. All three addressed the executive board. Kapelos' submissions lasted approximately 15 to 30 minutes. Kapelos discussed the complainant's case, including his work history. Kapelos also raised the issue of counsel, i.e., that the complainant wanted to be represented by counsel of his choice. The executive board asked some questions regarding Kapelos' experience and fees. Kapelos essentially responded that he would be "reasonable". There is no evidence that Kapelos asserted he had any particular familiarity or experience with the arbitration process or arbitral jurisprudence. Belanger requested that Kapelos forward his rates and fee estimates in writing; this Kapelos did not do. At the conclusion of the submissions, Belanger stated that the executive board would "get back to you and tell you our position, we want to consider this stuff [the complainant's work record], this is important". As noted, there was no indication, let alone undertaking, that there would be an opportunity to further address the executive board.

11. The executive board met again on January 3, 1985 and decided to recommend against proceeding to arbitration. Kapelos was notified of this decision by letter dated January 4, 1985 and informed that the general membership meeting was scheduled for January 8, 1985. The January 4 letter from G. Pineo, secretary-business manager, also stated that the complainant would be required to pay some \$35 to again become a member in good standing as the complainant had not paid his membership dues for some time. Arrangements were made with Pineo to pay the dues at the meeting. Kapelos also telephoned Belanger to request that the complainant's case be dealt with first; Belanger agreed.

12. Belanger chaired the January 8 meeting. Kapelos was asked to remain in the corridor



until Belanger could formally open the meeting and request a motion from the floor to adjourn the regular order of business in order that the complainant's case be heard first. Such a motion was made, seconded and carried. Kapelos was then introduced and permitted to make his submissions. The membership was informed of the executive board's position, i.e., a recommendation that the grievance not be arbitrated. One member, F. George, then moved not to proceed to arbitration. Belanger ruled that it was not yet proper to vote on the motion as there should be an opportunity for questions. Several questions were asked relating to the background to the present proceedings. Compton-Marshall, (executive vice-president and treasurer), read from the Board's October 31 decision and the union submissions before that Board. Kapelos then made further submissions in response to Compton-Marshall. Belanger was asked to reply personally to a question as to the basis for the executive board's decision. Belanger released himself from the chair to explain the factors considered by the executive board, including the complainant's entire work record. Herdman moved that the matter proceed to arbitration and the complainant be permitted to select the "section 45" route or a three-person arbitration board. That motion was seconded and carried by a two-thirds majority of those present. The complainant opted for the expedited arbitration route pursuant to section 45 of the Act.

13. Kapelos then raised the issue of the choice of counsel. Belanger stated the matter was out of order as any monetary question first had to be referred to the executive board in accordance with normal procedure. The complainant also addressed the meeting, giving his reasons for wanting his own counsel. That is, the complainant referred to the 1981 arbitration stating he had been promised a "top drawer" lawyer but ended up with a junior and he did not want this experience to be repeated. The complainant did not indicate that he did not trust the union executive or felt that they would not represent him fairly; in fact the union had supported him in grievances on other occasions. The exchanges between the various individuals became somewhat heated but the meeting remained orderly. Herdman suggested that the parties allow the matter to "cool down", that Belanger and Kapelos could meet in a few days to try and resolve the issue. Belanger was amenable to this suggestion. No formal motions permitting the complainant to be represented by counsel of his choice were proposed. Belanger then proceeded with the next item on the agenda.

14. The complainant had instructed Kapelos in early January to press forward on the "solicitor" issue and, if necessary, to file another complaint with the Board, although the formal retainer was not signed until February 5. Thus, subsequent to the membership meeting, counsel for the complainant continued to press that issue, primarily through exchange of correspondence. By letter dated January 10, 1985, Kapelos objected to the proceedings of the January 8 meeting and stated, *inter alia*:

I would ask that you reconsider your position with respect to Mr. Glykis retaining his own counsel as any slight deviation from the proper presentation and support will be questioned vehemently by Mr. Glykis and, in fact, leave the union susceptible to a further section 68 application.

15. Pineo replied on January 15 that the union intended to abide by its past practice regarding representation and informed Kapelos that February 12 would be the hearing date. By letter dated January 22, however, Pineo indicated that the union would permit the complainant to have his own counsel provided the complainant assumed the cost. Belanger testified that the union intended to have its counsel present at the hearing but would permit the complainant to have his own lawyer as well but at the complainant's own expense. Kapelos

spoke with Ryder, union counsel, in person on January 30 and continued to argue for the complainant's choice of counsel with fees paid by the union. As a result of Kapelos' meeting with the complainant on February 5, union counsel was informed by letter dated February 6 that the complainant could not attend the arbitration hearing due to the illness of his father and Kapelos yet again urged Ryder to withdraw from the case. The arbitration was cancelled on short notice and rescheduled for June 4. Kapelos conceded that, had the union agreed to permit him to represent the complainant with the union assuming the cost, he would have had to request an adjournment of the February 12 hearing in any event. Union counsel outlined the union's reasons for wishing its own counsel to conduct the complainant's case, in his letter of February 7. Then, by letter dated February 12, Ryder informed Kapelos that the union had decided to appoint C. Paliare as counsel for the arbitration. Paliare, a member of the same firm, had not had previous dealings with the complainant. It should be noted Paliare could not be described as a "junior"; he is an experienced counsel in the labour area. The instant complaint was filed on March 8, 1985.

16. Counsel for the complainant submitted that Belanger was not a credible witness, reviewed the evidence and asserted the executive board had demonstrated malice and ill will toward the complainant, particularly at the January 8 meeting. Counsel argued that Pineo's letter of January 22 indicated the union only objected to paying for the complainant's counsel and this, too, evidenced bad faith contrary to section 68 of the Act. Counsel contended that it would be improper for Ryder or anyone from that firm to represent the complainant, referring to the Rules of Professional Conduct (Rule 5); *MTS International Services Inc. v. Warnat Corporation Ltd.* [1980], 31 O.R. (2d) 221 (Ont. H.C.); *Lukic et al v. Urquhart et al.* [1984], 11 D.L.R. (4th) 638 (Ont. H.C.); *Steed & Evans Ltd. v. MacTavish et al.* [1976], 12 O.R. (2d) 236 (Ont. H.C.). Counsel argued that the Board had the authority to direct the union to permit the complainant to select his own counsel with the costs to be borne by the union and cited *Phillip Wayne Bradley*, [1983] OLRB Rep. June 865; *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338; *International Printing and Graphic Communications Union, Local 482*, [1977] OLRB Rep. Mar. 146. Thus, counsel submitted section 68 of the Act had been contravened and the appropriate relief, as noted, should be directed.

17. Counsel for the intervener distinguished the cases cited by counsel for the complainant on the ground that the solicitor in those cases had initially acted for a number of parties, had obtained confidential information during that period and then proposed to act for one of the parties against the others. In this case, counsel argued that the integrity of the arbitration process required that a party to the collective agreement, the union, have control over the union's case. Counsel selected by the complainant would owe a duty to his client, not the union, and this could result in proceedings which were costly to the parties to the collective agreement and destructive of the collective bargaining relationship. Counsel acknowledged there could be exceptional cases where the bad faith of the union was so outrageous that the Board would direct the union to bear the costs of counsel selected by a complainant. However, counsel asserted that those circumstances were not present in the instant case.

18. Counsel for the respondent reviewed the evidence and asserted that no breach of section 68 had been established. In response to Vice-Chairman Murray's October decision, the union had permitted Kapelos and the complainant to attend and address the executive board and membership meetings. The union was not obligated to do more and, in particular, was not required to permit the complainant to select counsel but bill the union. Counsel submitted

the union's usual procedures were followed, including Belanger's releasing himself from the chair in order to respond to a question and Belanger's statement that any motions regarding the "solicitor" issue would be out of order as financial items had first to be placed before the executive board. Counsel argued that the executive board had considered the appropriate factors in again recommending against arbitration, including legal opinion on success or failure, the complainant's work record, etc. Moreover, it was asserted that there was no evidence of malice, ill will or bad faith directed toward the complainant. Counsel agreed with counsel for the intervener's characterization of the cases cited by counsel for the complainant. Thus, counsel argued no violation of section 68 had been proved and, in the alternative, the relief sought was an extraordinary remedy for which there was no basis in the present circumstances.

19. Section 68 of the Act reads:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

20. The duty imposed by section 68 has been elaborated in a number of Board decisions. One of the most useful summaries is found in *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143 (the *Gormley* case) paragraph 18:

Over the years many aspects of the duty of fair representation have settled into place. The Board has repeatedly held that in order not to act in an arbitrary manner in the processing of a grievance, the union must direct its mind to the merits of the grievance and act on the available evidence. While the effective operation of the grievance machinery requires that unions also be allowed to consider factors beyond the merits of a particular grievance in deciding whether to process a grievance on to arbitration, considerations of this nature must have their roots in the welfare of the bargaining unit and the bargaining process and must not be based on irrelevant facts or principles. Additionally, a union is prohibited from processing a grievance in bad faith. An employee must not become the victim of the union's ill will such that a dislike for an individual dictates the path of the grievance rather than the merits of the grievance or legitimate concerns for the welfare of the bargaining unit and bargaining process. The prohibition against a union acting in a manner that is discriminatory functions to prevent a union from distinguishing among members in the bargaining unit unless there are good reasons for so doing. To avoid acting in a manner that is discriminatory, the duty requires, in general, that like situations be treated in a like manner and that neither particular favour nor disfavour befall any individual apart from the others unless justified by the circumstances. The duty does not make the union the guarantor for every aggrieved employee. Instead, the duty requires that the union consider the position of all of its members and that it weigh the competing interests of minorities or individuals in arriving at its decisions.

21. Further, given that the complainant asserts the violation of section 68 is founded in the alleged malice and ill will, the "bad faith" allegedly demonstrated by the executive board toward the complainant at the January 8, 1985 membership meeting, it is also appropriate to refer to the following passage from *Canadian Union of Public Employees Local 1000 - Ontario Hydro Employees Union*, [1975] OLRB Rep. May 444 (the *Princesdomu* case):

24. Bad faith and discrimination are not being alleged in the facts at hand but their meaning is well worth a brief examination. The sequential use of the words may assist in elaborating the total meaning of the duty and at the very least the particular application of each word demonstrates why this case is difficult. The prohibition against bad faith and discrimination describe conduct in a subjective sense - that an employee ought not to be the



victim of the ill-will or hostility of trade union officials or of a majority of the members of the trade union. (See Adell, *The Duty of Fair Representation - Effective Protections for Individual Rights in Collective Agreements?* (1974) 25 Indus. Rel. 602, 611.) Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, colour, sex, etc., preventing internal trade union politics from erupting into forms of invidious conduct; and in prohibiting extreme forms of interpersonal breakdowns within a trade union. It is basic to a system based upon an exclusive bargaining agent....

22. In the Board's view, there is simply no basis on which to conclude the executive board exhibited any subjective ill will or hostility toward the complainant in considering anew his grievance, in accordance with Vice-Chairman Murray's October decision. With respect to the December 13 executive board meeting, complainant's counsel was given proper notice. He and the complainant were permitted to make whatever submissions they wished to the executive board. The executive board then considered those submissions and recommended against proceeding to arbitration. On the evidence, there was no impropriety in reaching such a decision. Sufficient notice of the January 8 membership meeting was given to the complainant's counsel. The Board does not regard the requirement imposed on the complainant to pay the standard fee to become a member in good standing where the complainant had not paid the usual union dues for some time as in any way out of the ordinary. Indeed, the executive board accommodated the complainant in two respects. Firstly, Pineo agreed the complainant could pay the reinstatement fee at, rather than prior to, the membership meeting. Secondly, Belanger readily agreed to Kapelos' request to suspend the regular order of business to consider the complainant's grievance first. Such accommodations are just not suggestive of ill will directed by the executive board toward the complainant.

23. The January 8 meeting itself followed the usual procedures. Belanger carried out his agreement with Kapelos to suspend the regular order of business by seeking the appropriate motion from the floor. There was nothing improper in directing Kapelos to remain in the corridor until the complainant's case was to be considered. Kapelos was permitted to fully address the membership. The executive board presented their recommendation, and their reasons, openly. There is nothing sinister or improper in reading from Vice-Chairman Murray's decision or the union's submissions to the Board. Indeed, when Kapelos objected that this was somehow a "misrepresentation", he was permitted to again fully address the membership. Indeed, and of considerable significance, when Belanger was faced with a motion to uphold the executive board's recommendation right after Kapelos' initial representations, he ruled it was not yet proper to vote on the motion in order to permit full discussions and questions from the floor. Belanger did not seize upon an opportunity to force a vote on a motion "favourable" to the executive board; rather, he encouraged fuller discussion. Such conduct is the antithesis of "bad faith". Indeed, when the membership voted to proceed to arbitration, the executive board simply accepted the result. Subsequent to the vote, Kapelos and the complainant raised the "solicitor" issue. As noted earlier, the Board accepts the accounts of Herdman and Belanger, not Kapelos and the complainant, with respect to the meeting. Belanger's statement that the matter was out of order accorded with past practice in referring monetary matters to the executive board first. Whether or not formally included in the union's constitution, that was the past practice as supported by the uncontradicted evidence of Herdman, the complainant's own witness and Belanger. When the exchange became heated, Belanger was amenable to Herdman's suggestion that he (Belanger) and Kapelos meet subsequently to discuss the matter. In short, the Board finds there was no violation of section 68 in the conduct of the January 8 meeting, nor, in fact, in the entire dealing by the executive

board with the complainant's grievance subsequent to Vice-Chairman Murray's October decision.

24. Nor is there evidence of bad faith in Pineo's letter of January 22 permitting the complainant to have his own counsel provided the complainant paid the fees. As Belanger explained, the union intended to have its own counsel at the arbitration; the complainant, however, could have his representative in addition. The union's reasons for wishing its own counsel were outlined in Ryder's February 7 letter, as well.

25. It is also appropriate for the Board to deal briefly with other positions taken by counsel for the complainant. In the notice of the executive board meeting of December 13, 1984, the word "appeal" was used in connection with consideration of the complainant's grievance. Kapelos objected to the use of the term as implying a restricted review of the initial decision. On the evidence, it is clear that the executive board intended a "fresh look" at the grievance. The executive board considered the matter on a "*de novo*" basis. There is no evidence supporting a suggestion that the grievance was "appealed" in a technical legal sense. Secondly, it was suggested that there was impropriety in the executive board's "failure" to call Kapelos back for further submissions. Again, the evidence plainly establishes that Kapelos was given every opportunity to make his submissions, that the executive board considered those submissions in the context of their review of the grievor's work record and at no time indicated that there would be an opportunity for further submissions. This asserted ground for contravention of section 68, then, fails. At another point, complainant's counsel argued the notice of the January 8 membership meeting was inadequate and "therefore" a violation of section 68. This assertion, as well, is not supported by the evidence. The complainant and his counsel attended the meeting and made submissions without indicating any prejudice whatsoever resulting from the notice. Further, since both had made representations on the grievance at the December 13 executive board meeting, it is difficult to conceive of any prejudice from alleged inadequate preparation time, especially since the complainant argued throughout that one ground for having his own counsel at arbitration was because counsel was so familiar with his case. The Board, finally, finds no merit in counsel for the complainant's statement that a violation of Robert's Rules of Order, if one occurred when Belanger released himself from the chair to respond to a question, constitutes, in itself, a violation of section 68. Firstly, complainant's counsel did not introduce Robert's Rules of Order into evidence. Moreover, the procedure adopted by Belanger was, in the circumstances of a meeting of lay persons, entirely sensible.

26. Thus, there is no credible evidence of ill will, bad faith or discrimination in the present complaint. Nor, was there such evidence in the former complaint. That original complaint merely held that the complainant, because critical job interests were at stake, should have been given notice of the executive board and membership meetings sufficient to allow an effective opportunity to present his case. There is no suggestion in the original decision that the inadequate notice was motivated by ill will, bad faith or discrimination. Indeed, the Board's characterization of the matter as a lack of "common courtesy", although amounting to gross negligence in the circumstances, underscores the absence of ill will, bad faith or discrimination. The remedy in the original complaint gave the complainant the opportunity he had missed and, moreover, the membership voted to proceed to arbitration.

27. The Board has found that the complainant has not established a violation of section 68. The Board, then, need not deal with the remedy urged by the complainant's counsel that

the complainant be permitted to select his own counsel in respect of the arbitration hearing with the costs to be borne by the union. However, the Board has some comments on this issue. The complainant and his representatives have pursued this remedy with single-minded determination from the outset of the first complaint through the reconsideration request, the executive board meeting, the membership meeting, correspondence and in-person representations subsequent to that meeting and, lastly, in the instant complaint. In that single-minded pursuit, the complainant has been prepared to bend the truth and mislead the Board. Before this Board, there was even the suggestion that, if the union continued to refuse the complainant's demands and the arbitration failed, there could be yet another complaint filed with the Board. The Board in the former complaint (and on reconsideration) rejected the complainant's request that he be allowed to select his own counsel. The union has retained counsel highly experienced in the labour field and who has not had prior dealings with the complainant. To the extent the complainant was concerned about getting a "top drawer" lawyer, those concerns have been satisfied.

28. It must also be stressed that the complainant was not requesting the joint selection, by himself and the union, of "independent" counsel. In this regard, it is useful to set out the following passage from *Philip Wayne Bradley, supra*, cited by the complainant:

3. ... The Board has stated on numerous occasions that success in proving that section 68 has been breached does not automatically confer on the complainant the right to have his grievance arbitrated (see, for example *Massey-Ferguson*, [1977] OLRB Rep. April 216; *Bedard Gerard*, [1981] OLRB Rep. Oct. 1338). Where the Board does grant such remedy, it does not always make an order as to representation at such arbitration. The Board has normally specified who must represent the grievor at an arbitration it directs, as a result of a section 68 proceeding, where there are ongoing serious concerns that the complainant will not receive a non-arbitrary, non-discriminatory, good faith treatment by the respondent in the course of its presentation of the arbitration (see, for example, *Leonard Murphy*, [1977] OLRB Rep. March 146, the first reported decision where such an order is made). When the Board has made an order concerning representation at arbitration, the nature of the order has been that the union and the grievor *jointly* select a lawyer to handle their presentation (see *Leonard Murphy, supra*; *Bedard Gerard, supra*). In the *Leonard Murphy* decision, (*supra*), the Board ordered that jointly selected counsel present the case at arbitration because the union officials had twice failed to fulfill their duty under section 68, that relatives of these officials had been hired as replacements for the discharged grievors and that the bad faith operative within the relevant union officials eclipsed the complainants' individual rights. In the *Bedard Gerard* decision, *supra*, the union had actively thwarted the grievances of the complainant even to the point of improperly writing up a grievance so that the grievor's real complaint was not set out. No order as to representation was made on the facts in the case before me because the nature of the union's actions were not comparable to these decisions nor raised similar concerns regarding the respondent's ability to represent the grievor's interests at arbitration without violating section 68. There was no evidence presented to me which led me to conclude that an order directing legal representation, either jointly or exclusively chosen by the complainant, was warranted. An order for separate independently selected legal counsel would be highly extraordinary. A remedy under section 68 should not change the essential character of the arbitration process. The respondent is the party to the collective agreement and the arbitration not the grievor (*General Motors of Canada v. Brunet*, [1972] 2 S.C.R. 537) and would have, except for a violation of a section 68, had exclusive selection over whether the arbitration was to proceed and how. The interests of a bargaining agent and the grievor are united before an arbitration board. Jointly selected counsel has been ordered only where the Board feels there would be no truly united representation of the arbitration case for the respondent and the grievor. The joint selection process is to ensure that this unity is restored. The *exclusive* selection of legal counsel would effectively remove the essential unity of the grievor's and union's interests at arbitration.

29. The Board is not aware of any instance where a successful complainant has been



permitted, as a remedy to a violation of section 68 of the Act, to *unilaterally* select the counsel to appear at an arbitration hearing with costs to be assumed by the Union. Where a breach of section 68 is established, the Board must, of course, devise an effective remedy. However the remedy repeatedly urged by counsel for the complainant would do violence to the legislative scheme which establishes the trade union as exclusive bargaining agent. These comments are intended to place the complainant's requested relief in the broader legislative context. Quite simply, had the Board found a violation of section 68 of the Act, the Board, for sound labour relations reasons, would not have granted the remedy sought by counsel for the complainant.

30. For the foregoing reasons, the Board has concluded that the union has not contravened the duty of fair representation imposed by section 68 of the Act. As stated in the decision of May 27, 1985, the complaint is dismissed.

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**0659-85-R; 0918-85-R** Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607, Applicant, v. Thunderbrick Limited, Thunder Tile Limited and **Great Lakes Ceramics Inc.**, Respondents, v. Group of Employees, Objectors; Group of Employees of Great Lakes Ceramics Inc., Applicant, v. Labourer's International Union of North America Ontario Provincial District Council and Labourer's International Union of North America, Local 607, Respondent, v. Great Lakes Ceramics Inc., Intervener

**Sale of a Business - Unprofitable business closed down for some two years - Lease with option to purchase containing clause transferring goodwill - Some previous employees hired - No actual transfer of goodwill - No sale**

**BEFORE:** *D. E. Franks*, Vice-Chairman, and Board Members *F. W. Murray* and *T. Theobald*.

**APPEARANCES:** *David Strang* and *Pat Little* for Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607; *H. D. Bernhard, Q.C.* and *Ella Bernhard* for Thunderbrick Limited, Thunder Tile Limited; *William G. Shanks* and *Robert J. Gotts* for Great Lakes Ceramics Inc.; *F.J.W. Bickford* and *Joe Comuzzi* for Group of Employees of Great Lakes Ceramics Inc.

### **DECISION OF THE BOARD; August 16, 1985**

1. Board File 0659-85-R is an application by Labourers' Union Local 607 pursuant to section 63 and/or section 1(4) of the Act concerning the respondents Thunderbrick Limited and Great Lakes Ceramics Inc. Board File 0918-85-R is an application for termination brought by a group of employees with respect to the employees of Great Lakes Ceramics Inc. against the same Labourers' Local 607. Since the termination application is contingent upon a finding under section 63 or section 1(4) in Board File 0659-85-R, the Board dealt with the section 63/1(4) application first. In those proceedings counsel for the applicant Labourers' Union agreed to the participation in the proceedings by counsel for the group of employees in the termination proceedings. However, he reserved his rights with respect to the voluntariness of the petition document filed in the termination proceedings.

2. At the conclusion of the evidence in the section 63/1(4) application, counsel for the applicant Labourers' Union abandoned his application with respect to the section 1(4). The Board then heard the representations of the parties on the section 63 issue and at the conclusion of argument dismissed the section 63 application orally for reasons to be given in writing. Herein are the reasons for the decision in File No. 0659-85-R.

3. The applicant Labourers' Local 607 was certified for the employees of Thunderbrick Limited in 1977. Subsequently, collective agreements were entered into and in 1972 the then in forced collective agreement expired. The union and the employer Thunderbrick Limited had been negotiating for the renewal of that collective agreement. A "no board" letter had been issued in due course. At about that time, however, the respondent Thunderbrick closed its brick work plant in Thunder Bay.

4. The brick work plant in Thunder Bay had been developed in the mid 70's by West German interests through a corporate entity known as Thunderbrick Limited. A substantial amount of money was invested both by the West German family and the Northern Ontario Development Corporation. The scheme was to use a previous brick plant and local clay deposits. A large kiln was built and by 1977 the plant was in production. It appears, however, that the plant never made a profit, there were problems with the quality of the bricks and also with the decline in construction activity in the various construction markets. In any event, some time in the early 80's it was decided to try converting the plant from a brick plant to a tile plant again using the local clay and the facilities in Thunder Bay. It appears on the evidence before us that some trial runs were made at producing tiles. The tiles were unsatisfactory and could not be marketed and the plant was subsequently closed.

5. The owners of the plant maintained the closed plant at a considerable loss from the period of 1982 to early 1985. They attempted to sell the facility. The only serious offer they had apparently during this period was an offer to purchase the facility at scrap value. In the meantime it appears there were a substantial number of bricks and the "experimental" tile in the yard which, on the evidence, it appears the respondent Thunderbrick Limited tried to sell.

6. The respondent Great Lakes Ceramics Inc. is owned by two groups, one a group of investors who are former residents of Hong Kong and a Saskatchewan group whose initial activity was searching for and developing clay deposits for refractory uses. It appears that the Saskatchewan group had found and developed a clay deposit suitable for tile development and was anxious to go into the production of ceramic tiles. In investigating the possibilities for production they became aware of the unused site in Thunder Bay and commenced negotiations with the West German owners of the Thunder Bay site.

7. It is clear that there is no connection whatsoever between the West German interests which own Thunderbrick Limited and Thunder Tile Limited and the group which owns Great Lakes Ceramics Inc. The discussions concerning the Thunder Bay property eventually lead to a document which can best be described as a lease with an offer to purchase. Clearly, Great Lakes Ceramics Inc. was in a buyer's market and were able to extract quite favourable terms concerning the lease and possible purchase of the site. We need not go into the agreement in detail. The main thrust of it is that there is a \$50,000 payment at the start, for the first year there are no rent payments, the second year's rent is \$3,000 per month and the rent increases to \$5,000 a month after month. The option to purchase is to be exercised on or before December 31st, 1989. The purchase price would be 3.2 million dollars (the estimate of the amount of money used to develop the facility was of the order of 8 million). Of interest in the lease option agreement for our purposes is what is included and what is excluded from the purchase arrangement. Basically the lease purchase involves the manufacturing facility and the yard but excludes the local clay pits and the Thunder Bay clay pits from the agreement. The equipment purchased were essentially the equipment which had been used in relation to the experimental tile production. The brick equipment is not part of the transfer arrangement nor was any of the inventory of bricks and tiles in the yard, nor any customers' lists.

8. The agreement, however, contains a provision which reads as follows:

All right title benefit and interest of the vendor in and to all registered or unregistered trademarks, trade or brand name service marks, patent rights, goodwill, licences and franchises employed in connection with the Thunder Bay ceramic tile manufacturing facility.



Normally such a provision would signify the sale of an on-going concern. The evidence, however, and this is borne out by other parts of the agreement as well, is that there was no transfer of goodwill. In fact the evidence is clearly that Great Lakes Ceramics Inc. has had serious problems in overcoming the negative market reputation of the previous owners. It would appear that although the clause is in the transfer arrangement there was in fact nothing of that sort transferred.

9. It should also be noted that Great Lakes Ceramics Inc. has in fact hired seven people who had worked at the previous Thunderbrick operation several years ago. Counsel for the applicant argues that the fact that previous employees were employed, together with the clause transferring goodwill, are grounds for the Board considering this to be the sale of a business within section 63 of the Act. He also notes that the fact that the business has closed down some two years is not grounds for denying his application under section 63 of the Act.

10. Clearly, in the present case the form of the transaction, that is, a lease option to purchase is something which may be the subject of section 63 applications and, indeed, the fact that only part of a business has been sold is also something to which section 63 can attach. However, in our view, it is clear on the facts that no business was sold. Indeed, we are of the view that not even the assets which are sold can be considered to be "part" of a business. At best Great Lakes Ceramics Inc. has potentially bought certain facilities which were not capable of being used in the manner in which they intend to use them without significant modifications and different clay. It cannot be said on the facts of this case that Great Lakes Ceramics Inc. purchased a tile manufacturing facility from Thunderbrick Limited or Thunder Tile Limited since it is clear on the evidence that Thunder Tile Limited never had such a facility that could be sold. For these reasons, therefore, we are of the view that the transaction between Thunderbrick Limited or Thunder Tile Limited and Great Lakes Ceramics Inc. was not such as could be described as the sale of a business within the meaning of section 63 of the Act and for these reasons therefore the application is dismissed.

11. In view of our finding that Great Lakes Ceramics Inc. is not the successor employer to Thunderbrick Limited or Thunder Tile Limited, the proceedings in Board File No. 0918-85-R are therefore dismissed.

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**1484-83-R** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 680, Applicant, v. Port Weller Dry Docks, A Division of ULS International Inc., Respondent, v. International Brotherhood of Electrical Workers, Local 303, Intervener #1, v. **Hamilton Marine**, a Division of ULS International Inc., Intervener #2

**Constitutional Law - Employer business of carrying out running repairs and dry dock repairs on ships - Repairs essential to safe and continued operation of federal undertaking of navigation and shipping - Half of business performed outside Ontario - Undertaking extending beyond Ontario - Board applying *Wardair* court decision - Finding jurisdiction federal**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members S. Cooke and F. W. Murray.

**APPEARANCES:** B. Fishbein, D. Brown and M. Simons for the applicant; Harvey A. Beresford, Q.C. and R. K. Adamson for the respondent; B. Fishbein, Alex Glen and E. J. Swift for intervener #1; Earle Blackadder, Q.C. and Ian Fielding for intervener #2.

**DECISION OF THE BOARD;** August 6, 1985

1. The name of the respondent is amended to read: "Port Weller Dry Docks, A Division of ULS International Inc."
2. The applicant has applied to the Board under section 63 of the *Labour Relations Act* with respect to its bargaining rights as a result of an alleged sale of a business on an unknown date by Port Weller Dry Docks, A Division of ULS International Inc. ("Port Weller") to Hamilton Marine, a Division of ULS International Inc. ("Hamilton Marine"). It is the position of the applicant that, in the alternative, Port Weller and Hamilton Marine should be treated as constituting one employer for the purposes of the Act in that, at all material times, they were carrying on associated or related activities or businesses under common control or direction within the meaning of section 1(4) of the Act. Intervener #1 intervened and requested relief under both section 63 and section 1(4).
3. Hamilton Marine intervened as intervener #2 and denied that it was engaged in a related or associated activity or business with the respondent and also denied that the respondent and Hamilton Marine are under common control or direction. Hamilton Marine denied that it and the respondent came within the scope and ambit of section 1(4) of the Act. At the hearing, Hamilton Marine denied that there had been a sale of a business from Port Weller to Hamilton Marine. In addition, Hamilton Marine adopted the position that the Board had no jurisdiction to deal with the application on the merits because its natural and usual business, unlike Port Weller, was substantially extra provincial and, as such, fell within the exemption created by section 92(10) of the *British North America Act* as amended. Hamilton Marine also relied upon section 91(10) and argued that its business or undertaking came under the heading of "Navigation and Shipping".
4. The respondent adopted the position that it had always been treated for labour relations purposes as a company that came within provincial jurisdiction. The respondent denied that there had been a sale of a business to Hamilton Marine and also denied that the

respondent and Hamilton Marine were associated or related businesses carried on under common control or direction within the meaning of section 1(4) of the Act. At the hearing, the respondent supported the position of Hamilton Marine that the Board had no jurisdiction to deal with the application on the merits because the business of Hamilton Marine did not fall within the jurisdiction of the Province of Ontario. Initially, the Board heard evidence and argument on whether the Board had jurisdiction to entertain this application.

5. Port Weller has for many years been a party to a collective agreement with the applicant and intervener #1 (referred to in the collective agreement as the "union"). Article 2.1 of the collective agreement states:

2.1 The company agrees to recognize the Union as the sole collective bargaining agency for all its Employees, save and except Foremen, those above the rank of Foreman, and Assistant Foreman, Clerical and Office Staff, Guards and Plant Protection Employees.

The most recent collective agreement became effective on May 29, 1983, and remains in effect until May 31, 1986. Port Weller has been bound by the collective agreement with respect to a dry dock operation just outside St. Catharines where it carries on the business of the construction and repair of ships. A subsequent operation has been commenced in Port Colborne under the name of Hamilton Marine. Port Weller is a division of ULS International Inc. of Toronto ("ULS"). Hamilton Marine is also a division of ULS and is engaged in running repairs to ships as opposed to shipbuilding. ULS also operates other divisions (not affected by this application) such as Canal Contractors which also operates out of St. Catharines, is engaged in construction work and is a party to collective agreements with various building trade unions, such as the International Brotherhood of Electrical Workers.

6. ULS is a federally-incorporated company and owns twenty-six ships. These ships sail in international waters on the Great Lakes as well as elsewhere. ULS realized that it was spending a considerable amount of money on running repairs, that is to say, repairs which would be performed by repairers who stay on board ship to do the repairs as the ship proceeds from port to port. In this way ships would not be tied up in port and ULS would not be spending between three and four million dollars each year on repairs done by outside companies. Towards the end of 1982, Ian Fielding was working for Port Weller as an assistant repair manager when the idea of starting a second repair company was being discussed. The main operation of Port Weller was to fabricate and build new ships and to repair old ships with some guaranty work. A large part of the industry is the repair service to ships on the Great Lakes. These ships must by government regulation go into dry dock every five years in order to check the sea valves and inspect the condition of the underwater body of the ship. Quite often there will be damage on the bottom of the ship which may or may not be known to the owners. The dry dock survey ascertains the work which is required. On other occasions the owner of a ship will be aware of damage to a ship below the waterline and will put the ship in dry dock to discover the extent of the damage. When a ship is sold before title changes hands, the potential purchaser will put the ship into dry dock in order to do a survey on it. Surveys are also required for safety and insurance purposes. At Port Weller in St. Catharines up to fifty employees or about ten per cent of the work force was engaged in repair work. The remainder of the employees were engaged in the construction and conversion of ships.

7. While repairs may be performed while a ship is in dry dock, it is also possible to carry out running repairs on board a ship while the ship is carrying out its normal business of conveying cargo from one port to another. The benefit of this to a ship owner is that if



a ship is stopped for any reason, he is losing an average of \$1,000 an hour, based on a 24-hour day. Where a ship is a full-sized, self-loader, the cost of putting a ship in dry dock may amount to as much as \$40,000 a day. The need for repairs is particularly evident where a ship is carrying grain. At the point where it picks up the grain, an inspector from the federal government will go aboard and check the ship for cleanliness and any obvious dampness in the ship that will cause damage to the cargo. If an inspector sees any problem and the cargo is damaged in transit, he has the power to tie up the ship en route and he can refuse his certificate for the cargo. Moreover, a separate inspector who acts as the agent for the buyer at the port of destination may also refuse to accept the grain if its condition is not satisfactory. It was for this reason that ULS decided that it would get into the business of providing a service for itself and for any other shipping companies which used the St. Lawrence Seaway and Great Lakes system.

8. The prime aspect of the function of inspection is the concern for the safety of the crew. Certain problems of safety may be anticipated by the officers and crew of the ship and may be attended to as a running repair rather than have a more serious problem develop which would require a period in a dry dock. Port Weller had never engaged previously in running repairs and such work is now exclusively the work of Hamilton Marine. Hamilton Marine is one of twelve companies based in Canada which perform running repairs on the Great Lakes and St. Lawrence Seaway system. Of the eleven others, three are located in Port Colborne, three are located in Montreal, two are located in Sarnia, one is located in Toronto, one is located in Windsor, and one is located in St. Catharines. Before the creation of Hamilton Marine, ULS would utilize the services of one of these eleven running repair companies, depending upon the location of a particular ship within the Great Lakes and St. Lawrence Seaway system when a problem arose. ULS does not control any of the eleven other running repair companies previously referred to.

9. ULS has one of the largest shipping fleets in the Great Lakes and owns twenty-six ships of which eight are self-unloaders. Some of these ships are purely captive to the Great Lakes and have certificates which permit them to sail solely within the Great Lakes system. Some have Home Trade I certificates which allow them to trade anywhere along the eastern seaboard of Canada and the United States as far as Mexico. Eight ships fall into this category of which two are self-unloaders. The remaining fifteen ships can operate only within the boundaries of the Great Lakes and St. Lawrence Seaway system. A self-unloader ship is a ship which can come alongside a dock and completely discharge a cargo without any aid from a shore facility. All of the necessary equipment for self-unloading is contained on the ship. Hamilton Marine can and does repair self-unloading equipment.

10. In 1982, ULS owned one hundred and fifty-four acres in Port Colborne which was not being used. This property was ideally and strategically located for the purposes envisaged by Hamilton Marine and was available for its use. The factors which led to the formation of Hamilton Marine were the availability of this property, the prospect of preventing money from leaving the ULS group of divisions and companies, the creation of jobs in the area and a new job for Mr. Fielding. Hamilton Marine was placed under "probation" by ULS and was given six months to prove its feasibility in the competitive work of performing running repairs and operating a dry dock. In surveying the market, Hamilton Marine considered that its potential for obtaining work lay not only within the Great Lakes and St. Lawrence Seaway system, but also along the eastern seaboard of North America and the Gulf of Mexico. Hamilton Marine calculated that if it could expand into these areas, then, with an established and reputable name, it could expand into still other areas.

11. Hamilton Marine first commenced operations and hired employees in January of 1983 with Mr. Fielding as general manager. Its total sales from April 1, 1983, to March 31, 1984, amounted to 1.38 million dollars in its first fiscal year for running repairs and between \$150,000 and \$200,000 for winter work in Ontario. Subsequently, the fiscal year was changed from April to March, to January to December. About twenty-one per cent of its work is done along the eastern seaboard and in the Gulf of Mexico. Hamilton Marine presently employs eighteen employees and has employed as many as forty-eight. Each employee bears the title of repairman and has multi-faceted talents and trade skills which are necessary for the work of Hamilton Marine. The work includes plate expansions, welding, burning, shipwrighting, pipefitting, carpentry work, sheet metal work, and engine fitting work. Not everyone employed by Hamilton Marine has each skill referred to, but most of them have these skills and all of them have a very good blend of all of the skills. Each employee is required to have an aptitude for being able to supervise because Hamilton Marine does not have standard supervision on its jobs. An employee may be a foreman on one job and be one of the squad the next day. An employee has to order the material for the job and he may have to hire additional labour to do the job, for example, in Quebec City or New Orleans. He has to organize the required work around the normal operations of the ship so that there will be as little disruption as possible to the general working of the ship. In addition to Mr. Fielding, there is one superintendent and one person who is a working foreman. While the summer represents the time when the maximum work force is usually employed, the work of Hamilton Marine is very much a question of demand and supply.

12. Hamilton Marine has performed work on ships bound for Quebec City, Montreal, Thunder Bay, Indiana Harbour, New Orleans, Savannah, Philadelphia, St. John's, Long Harbour and St. George's in Newfoundland. The men are usually flown to a port, board the ship, and stay on board ship until they have completed their work. After disembarking, they either return to Port Colborne or proceed to the next job for Hamilton Marine. On occasions a job is extremely long and calls for extended work which involves the rotation of crews on the ship involved. One such job, for example, started in April and ran until October of the same year. The ship in question was trading between Tampa, Florida, and Long Harbour, Newfoundland, and various points along the way.

13. Hamilton Marine provides work on a 24-hour a day, 365 days a year basis wherever it is required. The nature of the work may require an employee to be away from home for an extended period of time. The need for flexibility, short notice and extended absences from home is explained to the employees before they commence their employment with Hamilton Marine. Hamilton Marine has hired all of its regular employees in Ontario. Its employees are dispatched from Port Colborne. Its offices, yard, work shop and warehouse facilities are all located at Port Colborne. Crews may consist of up to five employees. It is not possible to assign specific employees to do work solely within Ontario and to have other employees perform work outside Ontario.

14. The work of Hamilton Marine was originally carried out through the vehicle of Hamilton Marine and Electric Limited. Once the venture had established itself as viable and successful, the name was changed to Hamilton Marine, a Division of ULS International Inc. The earlier name was used because of existing invoices, ledgers, paperwork and bank accounts. Hamilton Marine purchased assets from Hamilton Marine Electric Limited and leased the property at Port Colborne from ULS. Mr. Fielding, with a technical background, had not



previously run a company. A vice-president of ULS set up everything that could be set up by Port Weller, including a separate bank account and the transfer of money into these accounts and arranged for the sale to Hamilton Marine of the expertise of the people within Port Weller. Certain equipment, materials and accounting services were sold to Hamilton Marine by Port Weller. Hamilton Marine was subsequently invoiced for the various services it had obtained from ULS and Port Weller. Mr. Fielding hired an accountant and a lawyer for Hamilton Marine.

15. Out of the total sales figures from April 1, 1983, to March 31, 1984, of approximately 1.38 million dollars, approximately \$265,000 was performed entirely outside the limits of the boundary of the Province of Ontario, together with amounts of approximately \$50,000 and \$26,000, on two specific Canadian ships which were also out of the Province of Ontario, for a total of approximately \$341,000. Therefore, approximately a quarter of the work performed by Hamilton Marine in running repairs was performed entirely outside the boundaries of the Province of Ontario. Moreover, work done on sailings within the Great Lakes from ports in Ontario to ports in other Canadian provinces or the United States equalled approximately \$350,000. Therefore, the total of the running repairs performed out of the Province of Ontario approaches fifty per cent of the total figure of 1.38 million dollars. Hamilton Marine also has work which originates and ends in Ontario but which crosses into American waters in the Great Lakes. The remaining fifty per cent of the work performed by Hamilton Marine is work performed within the boundaries of the Province of Ontario.

16. Hamilton Marine looks to future expansion along the eastern seaboard and in the Gulf of Mexico. It has also entered into a contract and has started work for a ship management company based in Hong Kong. Hamilton Marine holds itself out as willing to perform and does perform running repairs not only for ULS but for any owner at any place.

17. As part of its work force, Hamilton Marine has trained some of its employees as commercial divers. There are two reasons for this course of activity. Firstly, usually divers are not trained ship builders and when divers usually go under the ship and come up with information, it is difficult for the diver to express the technical information to the technical work force. When Hamilton Marine uses its own trained personnel, they are able to relate exactly what they have seen under the waterline. Secondly, it has been the experience of Hamilton Marine that it is awarded the subsequent work when its own divers are able to describe the nature of the work which is required. Hamilton Marine is also negotiating with a stone quarry in Nova Scotia to build and install a dockloading facility with a value of approximately one million dollars. In addition, representatives of Hamilton Marine attended a trade show in Chicago and became interested in a cargo handling system and has been promised it will be given the distribution rights in Canada. Such a loading system could be installed on ships throughout Canada.

18. The whole purpose of performing running repairs is to keep the ship working on its tasks and to keep it out of dry dock. However, running repairs may be made in dry dock. At some point repairs are so serious that a ship has to enter a dry dock. This is particularly true in matters of safety. Hamilton Marine performs repairs in its dry dock. Hamilton Marine has installed five docks outside the Province of Ontario. It has also installed a number of docks within Ontario. A very small proportion of the work of Hamilton Marine is installing furniture on ships and in providing provisions and materials for ships as they pass through the Great Lakes. Hamilton Marine has also fabricated and provided gangplanks for ships. On occasions



diesel fuel may be supplied to a ship - or Hamilton Marine will provide miscellaneous services, such as transporting crews, providing fire extinguishers and any lawful activity which is profitable to the company. Out of the total of 1.38 million dollars spent during the fiscal year previously referred to, about \$400,000 of that amount is not work which may be classified as running repairs. The winter work which is performed in Ontario by Hamilton Marine amounts to an additional \$150,000 to \$200,000 in the last fiscal year.

19. It was the position of the respondent and intervener #2 that the labour relations of the business operations of Hamilton Marine by virtue of the provisions of sections 91(10) and 92(10) of the *Constitution Act, 1982*, are governed by the *Labour Code, Canada* R.S.C. 1970 CL-1. Sections 91(10) and 92(10) provide as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

10. Navigation and Shipping.

92. In each Province the Legislator may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,

10. Local Works and Understandings other than such as are of the following Classes:  
(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

Section 108(1) provides as follows:

108(1) This Division applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

The applicant and intervener #1 have adopted the position that the business and undertaking of Hamilton Marine is neither in relation to navigation and shipping nor does it extend beyond the limits of Ontario.

20. The division of legislative powers between the Legislatures of the provinces and Parliament have recently been reviewed and analyzed in the Federal Court by Jackett, C.J. in *Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd.* [1979] 2 F.C. 91. At page 95, Jackett, C.J. stated:

Generally speaking, labour laws, i.e., laws regulating the relations between an employer and his employees, fall within the legislative powers of the provincial legislatures. Where, however, legislative power in relation to a work, undertaking or business has been vested in Parliament, such power usually includes the authority to legislate with reference to the relations between the operator of the work, undertaking or business and the persons employed by him in the operation thereof.

Most of the decisions cited relate to cases where the question was whether or not

the work, undertaking or business on which the employees in question were employed was a work, undertaking or business in relation to which Parliament could make a labour law. Here the problem is different.

Where there is a work, undertaking or business in relation to which Parliament has legislative authority in the field of labour relations, a problem arises as to where the line is to be drawn between areas in respect of which Parliament can so legislate and other areas in respect of which labour legislation falls in the provincial domain. Certain of the cases where this type of problem arises, may be classified as follows:

- (a) where an essential component of operating a federal work, undertaking or business is carried on by a person other than the principal operator thereof under some business arrangement for co-ordinating their activities,
- (b) where an essential component of operating a federal work or undertaking is carried on at a location physically remote from the work or undertaking,
- (c) where fringe operations, reasonably incidental to a federal work, undertaking or business are carried on by the operator thereof as an integral part of the operation thereof, even though they are not essential to its operation,
- (d) where a person other than the operator of a federal work, undertaking or business carries on activities that are not essential to the operation thereof but could be carried on by the operator thereof as reasonably incidental to the operation of that work, undertaking or business.

These different classes of problem call for further comment.

With reference to Class (a), when the essentials of operating a work, undertaking or business within the federal field are carried on in part by one operator and in part by another, the employees of both fall within the federal legislation field. This can be deduced from the *Stevedoring Reference* to the Supreme Court of Canada.

The problem in Class (b) is like the problem in Class (a). Where part of the essentials of operating a federal work or undertaking are carried on at a place physically remote from the work or undertaking, the employees of such a remote place nevertheless fall within the federal field. This is involved in what was decided by this Court last December in the *C.S.P. Foods* case *supra* page 23.

A more difficult problem arises in connection with Classes (c) and (d). A particular activity may be reasonably incidental to the operation of a federal work, undertaking or business without being an essential component of such operation. For example, an interprovincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy prepared food. Generally speaking, where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation. Compare the decision of the Supreme Court of Canada in the *Construction Montcalm* case (1979) 25 N.R. 1, that was delivered last December.

To sum up the reference to Classes (c) and (d), as I understand the law, where something is done as an integral part of the operation of a federal work, undertaking or business and that something is *reasonably incidental* to such operation, it may be

regulated by Parliament as part of the regulation of that work, undertaking or business even though it is not *essential* to the operation of such a work, undertaking or business; but where such a thing is made the subject of a separate local business or businesses, it cannot be regulated by Parliament merely because, if it were done as an integral part of operating a federal work, undertaking or business, it could, as such, be regulated by Parliament.

21. The positions of the parties that the business operations of Hamilton Marine do or do not fall within the provisions of section 91(10) relate to the heading of navigation and shipping. In the case of *In the Matter of a Reference as to the validity of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952, C.125, and as to its Applicability in Respect of Certain Employees of The Eastern Canada Stevedoring Company Limited* [1955] S.C.R. 529, [1955] 3 D.L.R. 721, (the “*Eastern Canada Stevedoring*” case), the Supreme Court of Canada decided that the *Industrial Relations and Disputes Investigation Act*, a statute of Parliament, applied in respect of the employees in Toronto of the Eastern Canada Stevedoring Co. Ltd., employed upon or in connection with stevedoring and terminal services consisting exclusively of services rendered in connection with the loading and unloading of ships, pursuant to the contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during the season on regular schedules between ports in Canada and ports outside Canada. As Abbott, J. observed in *Eastern Canada Stevedoring* at page 591:

It seems clear that the loading and unloading of ships (often referred to as stevedoring when done by men who are not members of the ship's crew) is an essential part of the transportation of goods by water. As such, in my opinion, it comes within the exclusive legislative authority of Parliament under head 10 of s.91 of the *British North American Act* “*Navigation and Shipping*”, which term, as Viscount Haldane said in the *Montreal Harbour Commissioners Case* [1926] A.C. 299, at 312, is to be widely construed.

[emphasis added]

22. The review and analysis of Jackett, C.J. in *Wardair* is helpful in deciding the issue before the Board. The respondent and intervener #2 agree that the work of Hamilton Marine falls within class (a), that is to say, the work of Hamilton Marine is an essential component of operating a federal work or undertaking, shipping and navigation, and is carried on by a person other than the principal operator thereof under some business arrangement for co-ordinating its activities. The applicant and intervener #1 argue that the work of Hamilton Marine falls within class (d), that is to say, the work of Hamilton Marine as a person, other than the operator of a federal work, undertaking or business, consists of carrying on activities that are not essential to the operation thereof and could be carried on by the operator thereof as reasonably incidental to the operation of that work, undertaking or business.

23. The issue to be determined is whether the activities of Hamilton Marine are an essential component of operating a federal work or undertaking or whether its activities are not essential to the operation thereof. The applicant and intervener #1 relied on *Tymac Launch Service Ltd. v. Canadian Brotherhood of Railway, Transport and General Workers, Local 400* (1980) 81 CLLC 16,072. In that case, an employer operated a launch service and, as part of expediting the processing of ships through the port of Vancouver, supplied transportation services to ships at anchor. The British Columbia Labour Relations Board held that the employer's business was subject to provincial labour relations legislation. The Board reasoned that although the transportation services to and from the shore were important to ships at



anchor, the operations of the employer were at best incidental and not essential to the shipping industry. Shipping could go on at some inconvenience without the employer's operations, but it could go on. The work of Hamilton Marine consists of performing running repairs on ships during the course of their movement within the Great Lakes and St. Lawrence Seaway system, the eastern seaboard of North America and in the Gulf of Mexico. These repairs relate to mechanical, electrical and physical integrity of the ships and their cargoes, as well as to requirements of safety. In addition, Hamilton Marine from time to time operates a dry dock for inspections and major repairs. In the view of the Board, the running repair services provided by Hamilton Marine are more than incidental services and constitute more than a mere convenience. The running repairs provided by Hamilton Marine are essential to the safe and continued operations of the ships which receive these services.

24. The applicant and intervener #1 argued that a distinction could be made between the profitability of a work and undertaking and an activity which was essential to the operation of a work or undertaking. It was argued that Hamilton Marine's services affected the profitability and non-profitability of its customers and that such services were in no way essential to shipping and navigation. The ability of Hamilton Marine to perform running repairs with respect to mechanical, electrical and safety matters affects the profitability of a carrier, because an idle ship is losing its owner between \$24,000 and \$40,000 a day. However, a ship's ability to operate at all is affected by its physical integrity and the safety of its crew. In addition, the requirements of insurance, certification and the approval of clients' agents in accepting the condition of a ship or accepting the condition of cargo on arrival, such as grain, for example, is affected by the ability of a ship to travel according to its schedules. The function of the ships as a method of transportation is vitally and essentially affected by the activities of Hamilton Marine. Allowing for the wide interpretation usually given to shipping and navigation under head 10 of section 91, the Board finds that Hamilton Marine's operations are an essential component to operating a federal work or undertaking, navigation and shipping, and that the labour relations of its employees are governed not by the *Labour Relations Act*, but rather by the *Labour Code, Canada*.

25. The second argument relates to section 92(10)(a) and the issue is whether the work or undertaking of Hamilton Marine is a work or undertaking connecting Ontario with any other or others of the Provinces or extending beyond the limits of the Provinces. Approximately fifty per cent of the running repairs performed by Hamilton Marine consists of work which is (a) performed wholly outside Ontario in other provinces, American or international waters or (b) originating or finishing in Ontario but finishing or originating outside Ontario.

26. In the *Eastern Canada Stevedoring* case, Taschereau, J. expressed the opinion at page 543 that since the ships were operated on regular schedules between parts in Canada and parts outside Canada, the operations of the company was exclusively of federal concern under head 10 of section 92. Fauteaux, J. expressed a similar opinion at page 589. In *Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Association 1688 et al.* (1980) 30 O.R. (2d) 732, the Divisional Court in the judgment of Reid, J. expressed the view at pages 736 and 737 that in interpreting section 92(10)(a), the main, ordinary or predominant business of the undertaking is to be considered in determining constitutional jurisdiction. The ordinary or predominant business of Hamilton Marine is the work or undertaking of performing running repairs on ships while they regularly operate either in international waters or as they regularly travel across the boundaries of Ontario. This work or undertaking is carried on throughout the year while the drydock work is essentially confined to the months in winter. To use the

language of other cases, for example, *A.G. Ontario et al. v. Winner et al.; Winner et al. v. S.M.T. (Eastern) Ltd. et al.* [1954] A.C. 541, the pith and substance of Hamilton Marine's business is a work or undertaking which provides running repairs which connect Ontario with any other or other of the provinces or extending beyond the limits of Ontario. Therefore, by virtue also of the provisions of section 92(10)(a), the activities of Hamilton Marine are such that the labour relations of its employees are governed not by the *Labour Relations Act*, but rather by the *Labour Code, Canada*.

27. For the foregoing reasons, the Board finds that it does not have jurisdiction to entertain this application. Accordingly, this proceeding is terminated.

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**1742-84-R** United Steelworkers of America, Applicant, v. 472275 Ontario Limited c.o.b. as **Industrial Welding Products Co.**, Respondent

Bargaining Unit - Practice and Procedure - Respondent locations in Hamilton, St. Catharines and Oakville operating business of sales and delivery of product - Some interaction among employees - Board considering community of interest and viability of collective bargaining - Departing from policy of restricting units to single municipality

**BEFORE:** *Lita-Rose Betcherman*, Vice-Chairman, and Board Members *F. C. Burnet* and *B. L. Armstrong*.

**APPEARANCES:** *David Nicholson* and *Ted Jez* for the applicant; *J. Paul Wearing*, *Yvonne Capstick* and *Earl Powell* for the respondent.

**DECISION OF LITA-ROSE BETCHERMAN, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG;** July 24, 1985

1. The applicant union has been certified on an interim basis as the bargaining agent for a group of the respondent's employees, drivers and warehousemen, at the central location at Hamilton. The applicant has asked the Board to include in the bargaining unit (a) employees at the respondent's Oakville and St. Catharines branches and (b) two order desk dispatchers at the respondents Hamilton location. The respondent takes the position that the three locations should be considered separately for labour relations purposes and that the dispatchers are managerial personnel and should be excluded from any bargaining unit. At the hearing, the applicant conceded that the order desk dispatcher at Oakville should be excluded as a manager; the respondent conceded that the dispatcher at St. Catharines should be in the unit. Thus two matters must be determined: (a) the geographical scope of the unit, and (b) whether the order desk dispatchers at Hamilton are managers or employees for purposes of the Act.

2. The respondent operates out of all three locations. Hamilton is the central location with five drivers, one warehouseman, the two dispatchers in question, some office staff, a purchasing agent, assistant purchasing agent, and the owner. At St. Catharines there is one driver, the dispatcher and a salesman. Oakville is staffed by two drivers, and the dispatcher.

3. Briefly stated, the respondent's operation consists of sales and delivery of product. Although there is some overlap, each of the three locations services its own district. Drivers at the three locations do not exchange routes and each is given instructions from the local order desk. However, all product and supplies are housed at Hamilton and drivers from the two branches make pickups there several times weekly. One of the drivers at Hamilton is a "floater" who is available to the branches for relief duty. Other Hamilton drivers are also transferred temporarily to fill in for absent drivers or in emergencies. There have been a few permanent transfers from Hamilton to Oakville. Payroll and invoicing are handled at the central location in Hamilton.

### Geographic Scope

4. The applicant argues that, notwithstanding the distance between the three locations, a strong community of interest exists among all the employees in that they perform the same type of work under similar conditions, intermingle to some extent, and come under the same centralized administration. The respondent maintains that there is no regular functional interdependence among the employees at the locations in the three different cities to justify making an exception to Board policy.

5. Generally speaking, it is Board policy to keep a bargaining unit within municipal boundaries. However, it will sanction going beyond the municipality under exceptional circumstances, where, for instance, there is substantial intermingling of employees or where refusal to do so would interfere with the employees' right to organize and bargain collectively. (See *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491.) In the instant case, the Oakville branch has three eligible bargaining unit employees and the St. Catharines branch has two. There was no suggestion of these employees being swept into the bargaining unit in question against their will. Clearly, it would be a much more viable situation for the few branch employees to bargain as part of the larger bargaining unit than separately. This in itself need not be conclusive, but the viability factor is buttressed by evidence of interaction between the employees at the branches and those at Hamilton. Branch drivers go to Hamilton regularly to pick up supplies; Hamilton drivers fill in temporarily for branch drivers and make emergency deliveries; there have been transfers between locations. Moreover, the fact that job categories cut across the separate locations creates a community of interest conducive to collective bargaining. Wage rates in the three locations do not appear to be so dissimilar as to create problems. Under these circumstances, the Board is of the view that it is appropriate to include the employees at the Oakville and St. Catharines locations in the bargaining unit with Hamilton employees.

### Managerial Exclusions

6. The next question is whether it is appropriate to include the two Hamilton order desk dispatchers, Earl Powell and Gordon Bailey, in the bargaining unit. The respondent asserts that they exercise managerial functions within the meaning of section 1(3)(b) of the Act and should be excluded from the unit.

7. In *Etobicoke Hydro Electric Commission*, [1981] OLRB Rep. Jan. 38, the Board stated:



25. Exercising supervisory functions does not by itself exclude a person from engaging in collective bargaining. Even when a person is primarily engaged in the supervision of others he is not managerial unless he has effective control over their employment relationship.

The rationale is that bargaining unit personnel should not be placed in a conflict of interest position caused by divided loyalties to management and to the unit.

8. The performance of the usual supervisory duties of a dispatcher does not necessarily result in a managerial exclusion. (See *Essex County Automobile Club*, [1985] OLRB Rep. Feb. 256.) In that case the Board found it appropriate to put the dispatchers in the drivers' unit. However, there was no indication that the dispatchers were managerial and such was not claimed.

9. The real determinant is whether the dispatcher affects the employment relationship of the people supervised.

10. Both Mr. Powell and Mr. Bailey were examined at the inquiry conducted by the Board Officer and their testimony appears in the Officer's report. Since the determining issue is their effect upon the employment relationship of the drivers and warehousemen, the Board will restrict itself to this aspect of the evidence in the report.

11. Both men testified without contradiction that they had been told by the owner that their jobs were equal. Yet their testimony as to managerial duties differed radically. According to Mr. Powell, he had the power to hire, fire, give time off, assign overtime, and discipline. On the other hand, Mr. Bailey, who had been a dispatcher for five months prior to the application for certification, stated that he had no power to hire or fire or give time off; he did say that he had authorized overtime and would reprimand a driver if his work was not satisfactory. Much of Mr. Powell's description of his "managerial" functions was speculative since he had been employed by the respondent for only a little more than a month before the application for certification. This was particularly evident in his responses regarding the granting of time off. He did, however, assert that he had hired and fired a full-time driver. While acknowledging that Mr. Powell interviewed job applicants, Mr. Bailey stated that the actual hiring and firing was done by the owner. Apart from the one disputed instance, neither dispatcher had, to date, issued other discipline. Neither knew how much or in what manner the drivers were paid.

12. The Officer's report includes the testimony of a driver and a driver/warehouseman from the Hamilton location. Despite a perception that Mr. Powell was the dominant one of the two dispatchers, these employees stated that they take instructions equally from Mr. Bailey. It should be noted that the drivers have regular runs and that incoming orders are assigned as a matter of course to the driver in that area. Overtime also arises out of the individual driver's schedule. Thus, rather than exercising discretion in the assignment of work, the dispatchers appear to be co-ordinators.

13. Neither of the drivers gave any indication that his employment relationship was affected by either Mr. Powell or Mr. Bailey. One driver testified that any discipline he received came from the owner and that his vacation was scheduled by the woman in charge of the

office. The impression gained from reading their testimony is that the direction they receive from the dispatchers does not involve personnel matters.

14. Mr. Powell and Mr. Bailey agree that they do the same job. This was corroborated by the drivers, one of whom stated that he had not noticed any difference in the functions they performed. However, the dispatchers' evidence was contradictory as to whether the job involved managerial functions. Because of Mr. Bailey's five months incumbency compared with Mr. Powell's one month, the Board finds the former's evidence more reflective of the actual job. The gist of Mr. Bailey's evidence is that the dispatchers do not exercise real discipline over the employees and have no impact on their earnings. Their lack of effective control over the drivers' employment relationship is borne out by the drivers themselves. The difference in job performance appears to lie in the differing personalities and motivation of the two men.

15. With respect to Mr. Powell's claim that he hired and fired a driver on his own authority, the Board is satisfied that his input to the hiring was in the nature of an appraisal and that the dismissal of the same employee was a foregone conclusion in light of established company policy.

16. The Board finds that neither Mr. Powell nor Mr. Bailey operates at a decision-making level that would result in a conflict of interest if they were in the bargaining unit. It should be noted that, unlike the situation at the Oakville branch, there are persons other than the dispatchers who perform managerial functions at the Hamilton location. It is also worth noting that the dispatcher at the St. Catharines' branch is included in the bargaining unit by agreement of the parties.

17. On the evidence before it, the Board determines that Mr. Powell and Mr. Bailey do not exercise managerial functions within the meaning of the Act and that they should not be excluded from the bargaining unit.

18. The composition of the bargaining unit is thus finally resolved. The Board accordingly finds that all employees of the respondent at Hamilton, Oakville and St. Catharines, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

19. Having regard to the agreement of the parties and for purposes of clarity, the Board declares that Ron Jackman, order desk/dispatcher ("foreman"), Oakville, is not included in the bargaining unit described above.

20. A formal certificate will now issue to the applicant.

#### **DECISION OF BOARD MEMBER F. C. BURNET;**

1. I dissent from the decision of my colleagues both in respect to the geographic scope of the bargaining unit and the inclusion of two persons who have supervisory responsibilities.

2. With respect to the first issue, the geographic scope of the unit, it is established

Board policy not to include in a unit, employees who are located at other locations beyond the municipal boundary. Exceptions to this policy have involved two basic considerations.

3. First, is the concept of the right of self organization which would lead the Board to include a single employee from outside the municipality who is a union member and would otherwise be ineligible for union representation, as a consequence of the rule that a viable bargaining unit must comprise more than one person. This is not the situation in the subject case, as both the St. Catharines and Oakville operations of the company comprise two or more employees and are thus potentially viable units in their own right. Indeed, their capability of self organization was not disputed and on this ground alone I would not sweep the employees of the two outlying operations into the unit. Having established viability, the belief of the majority that “it would be a much *more* (emphasis added) viable situation for the few branch employees to bargain as part of the larger bargaining unit than separately” is not an appropriate or compelling basis for deviating from long established policy, even if true.

4. The second and additional prerequisite to the crossing of municipal boundaries is existence of a substantial community of employee interest. In this case, the Oakville and St. Catharines operations were separately established to serve a widespread market area. While there was a sensible (and commonplace) centralization in Hamilton of payroll, purchasing and similar ancillary functions, the two branches stand essentially on their own in terms of markets served, staffing and day-to-day management and operations. The uncontradicted evidence of four drivers clearly established that transfer of staff was a rarity, being confined to occasional holiday relief or sickness absenteeism and is not always practised even in those circumstances. When it is, it is practised as a convenience to management and not as an integral obligation or requirement of the business.

5. Similarly, there are occasional trips to Hamilton to pick up supplies and there are the obvious similarities in job function and wage rates that one finds in virtually identical but separate operations. These may provide a surface indication of community of interest, but they are not essential ingredients. Those essentials are the degree to which employees, by right, policy or function move through the same lines of progression, the degree to which they are functionally interrelated and the extent to which they may, by right or policy, bump or displace each other, interact on relief schedules and generally impact on each other in work functions or job security rights and privileges. Community of interest for purposes of the Act refers to community of *employee* interest in their essential work functions and should not be confused by incidental or peripheral arrangements whose basis is more management convenience or the furthermore of organizational efficiency objectives.

6. The weight of evidence clearly indicates a minimal degree of community of employee interest in this situation. No more really than that the functions are similar as between areas and that all employees are dependent on the viability of the whole company, as in any multi-unit operation. I would accordingly declare the three units to be separately certifiable units under the Act and exclude the two branches from the current application.

7. On the issue of foremen, the measurement of the degree to which they exercise or are charged with exercising disciplinary and control functions is obscured by two characteristics of this operation. First, the employees concerned (for the most part drivers), are on the road and on their own, except for brief periods at the beginning and end of their shifts when they receive assignments, load stock and unload returns. Their work is well defined, the pace is



dictated by the number and location of deliveries and their contacts or relationship with customers are largely self-governed. Thus, their proximity to and interaction with the foremen is minimal, as compared to a typical factory or assembly line situation. Second, the group is small and the jobs relatively unskilled, comprising mainly the physical skill to drive the truck safely and the need to learn the route.

8. There are accordingly few occasions for the actual exercise of supervisory direction and authority of the kind we are here concerned with. This does not mean that it does not exist but simply that its existence is not measured by the number or frequency of incidents. Even in a typical factory situation, a foreman in a small, structured work unit often operates for months or years without the necessity of firing or imposing anything but the most cursory of disciplinary control - yet he is still a foreman.

9. Moreover it should not be necessary that a foreman demonstrate an unfettered personal authority to fire or severely discipline an employee, without consultation or restraint, in order to prove that he is indeed a foreman. That is an arbitrary concept more typical of the last century and not a proper conceptual basis for Board policy or decision. Given the complexity of law, corporate policy, collective agreements and the seriousness of disrupting employees' pension and job rights, a prudent foreman is generally encouraged, and frequently required in progressive industries, to seek advice from other appropriate management sources before making a final decision or even recommendation - but such prudence or concern does not detract from his responsibility to direct, control and discipline employees to the extent necessary to do the job.

10. Against these observations, the balance of evidence clearly confirms the foreman status of the two individuals at issue. One had in fact discharged an employee and both were firmly in accord that they could and had reprimanded employees. There is, I think, nothing "speculative" about Powell's perception of his job, because of his short tenure. On the contrary, the very shortness of his tenure in relation to his clear conception of his responsibilities and authority and his actual exercise of that authority in so short a time confirm that he is a foreman. The record is less sharp concerning Bailey; there is no doubt that he is less aggressive in the role but that is a matter of personal style and not job difference. There is no doubt that both would be held accountable for failure to correct misdemeanours or for issuing faulty directions adversely affecting the operation. I am reinforced in my view of the weight of evidence and argument by considering the consequences of including the disputed persons in the unit - If these men are not foremen, then there is no foremen or other supervisor in a major and critical segment of the business - except for the President of the company, since there are no intervening levels of supervision. Inclusion of the two foremen in the unit is clearly organizationally untenable. It can only result in a strained, and artificial reorganization of duties and responsibilities that is inefficient and unnecessary to the accomplishment of the Act's purposes as well as seriously and adversely detrimental to the position and welfare of the two incumbents. I would exclude the two foremen from the unit.

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**0190-84-R** Christian Labour Association of Canada, Applicant, v. **Jen-Ry Utility Contracting Company Limited**, Pemrow Pipelines Construction Company Limited and R. F. Wilson Limited, Respondents, v. International Union of Operating Engineers, Local 793, Intervener #1, v. Labourers' International Union of North America, Local 183, Intervener #2

**Certification - Construction Industry - Trade Union - Construction employer selecting one of several rival unions to represent its employees - Deducting dues pursuant to employee authorizations before collective agreement or voluntary recognition signed - Whether constituting other support - Whether applicant union denied certification**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *J. A. Ronson* and *B. L. Armstrong*.

**APPEARANCES:** *Elizabeth Forster*, *Ed Vanderkloet* and *Ron Rupke* for the applicant; *C. E. Humphrey* and *R. Whittington* for the respondents; *A. M. Minsky, Q.C.*, and *T. Dionisio* for the interveners.

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN AND BOARD MEMBER J. A. RONSON; August 9, 1985**

1. This is the continuation of an application for certification in which the Board, in a decision dated November 5, 1984, dismissed the interveners' applications under section 1(4) and 63, and found that those trade unions did not hold bargaining rights for the employees of the respondent Jen-ry. Subsequent to that decision the applicant and respondent waived their objection to the interveners' making argument with respect to the application of section 13 of the Act, and the Board re-convened to hear those submissions.

2. Section 13 of the *Labour Relations Act* provides:

"The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin."

Similarly, section 48(a) of the Act provides:

"An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union."

It is the submission of the interveners that section 13 bars certification of the applicant in this case on the basis that the employer:

- (a) selected the applicant Christian Labour Association of Canada as the bargaining agent for its employees, and

- (b) some time thereafter, with neither certification or a collective agreement to support it, deducted and remitted union dues to the applicant.

3. The facts upon which those submissions are made are not in dispute. Robert Whittington, the respondent's principal, had been employed by Pemrow Pipelines, with whom the interveners had bargaining rights. As Pemrow entered into a process of winding down, Mr. Whittington, who had been doing a small amount of work outside Pemrow, began to prepare for the day when he would be in business totally on his own. Mr. Whittington was familiar with the interveners through his work at Pemrow, but wanted to see what other trade unions were available to supply him with men. He telephoned the I.B.E.W., but lost interest when they asked him to come down and sign an agreement immediately. At some point a friend of Mr. Whittington's who was engaged in similar work for another company mentioned to Mr. Whittington that his company had a collective-bargaining relationship with the applicant, and found them reasonable to deal with. Mr. Whittington accordingly contacted the business agent for the applicant, Mr. Rupke, with whom his friend had been dealing, and asked him "what he had for men", and what kind of rates would apply. On the basis of those responses, Mr. Whittington decided he would "give them a try".

4. When the actual start-up date for Mr. Whittington commencing business on his own was established, he called Mr. Rupke and asked him to send men to the site. Mr. Rupke complied, and also indicated that he would be applying to the Labour Board for certification. Mr. Whittington was content to have that happen, and made no comment. Mr. Whittington acknowledged in evidence that he was not disposed to having the interveners come in to represent his men, and that the applicant's rates would make him "more competitive". The respondent's bookkeeper had come from Pemrow and initially began making deductions from the employees for "working dues" as she had at Pemrow. The evidence is that this was done by the bookkeeper in error, without instructions, and there is no evidence that the money incorrectly deducted was ever paid to the applicant (who has no such "working dues"). We do not find on the evidence that such payment was ever made, or that the applicant or Mr. Whittington were even aware that the payroll deductions were being made. The applicant does, however, have regular monthly dues, and after the applications of the interveners had delayed certification of the applicant for several months, Mr. Rupke approached Mr. Whittington about checking off union dues for those employee-members of the applicant who requested it. Mr. Whittington was agreeable, and Mr. Rupke collected completed authorization forms from its members working for the respondent, and deposited them with the respondent's payroll clerk. By this time the size of the respondent's work force had grown considerably, with over half of the employees having come from sources, such as Pemrow, outside the applicant. In spite of this, the interveners point out, the applicant's check-off forms represented approximately three-fourths of the respondent's accumulated work force.

5. The interveners in argument relied upon a number of cases both within and outside of the construction industry, and all of which pre-dated the decision of the Board in *Nicholls-Radtke*, [1982] OLRB Rep. July 1028. Counsel for the interveners, eminently familiar with the *Nicholls-Radtke* case, conceded that the events of the present case bore "some of the earmarks of the common, ordinary situation", but submitted that the timing of these events, and in particular the admitted intention of the employer to have the applicant as the bargaining agent for its employees rather than the interveners, distinguishes this case from *Nicholls-Radtke*. And counsel submits that section 46 of the Act confirms that "accommodations" such



as that agreed to here would violate the Act were it not for the inclusion in the Act of section 46 itself, and that that section protects such conduct only in the context of a *collective agreement* which *requires* the accommodation in question. Section 46(1) provides:

“Notwithstanding anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in it provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;
- (b) for permitting an employee who represents the trade union that is a party to or is bound by the agreement to attend to the business of the trade union during working hours without deduction of the time so occupied in the computation of the time worked for the employer and without deduction of wages in respect of the time so occupied;
- (c) for permitting the trade union that is a party to or is bound by the agreement to use the employer's premises for the purposes of the trade union without payment therefor.”

6. The applicant points out in response that mere “selection” of a trade union is not even mentioned in section 13, and that the practice in construction of choosing a particular trade union as a source of men is well established, and recognized by the Board in *Nicholls-Radtke*. The applicant further points out that many contractors are *required* to make that selection in the construction industry pursuant to the terms of their own or another collective agreement. With respect to the deduction of dues, the applicant points out that the deductions were done pursuant to *voluntary* authorizations only, and that all such deductions occurred well after the terminal date established for this application. The applicant argues that the purpose of section 13 is to protect the integrity of the membership evidence, and that events which occur subsequent to the filing of what is not challenged here as other than properly-acquired membership evidence, are irrelevant. The submissions of the respondent were to the same effect.

7. In the Board's view, evidence relevant to section 13 is not necessarily confined to the period preceding the terminal date of an application for certification. The section *is*, however, confined to the question of whether the Board, in a given application, ought to or ought not to certify. Evidence capable of “disqualifying” a trade union under the terms of section 13 may arise at any time prior to the Board actually certifying. After that point, section 48(1) takes over, and vitiates the effect of any collective agreement entered into subsequent to certification (as well as by voluntary recognition) on behalf of a disqualified trade union. There is, therefore, as Mr. Minsky for the interveners put it, no point in time where the employer can grant improper “favours” with impunity. The question before the Board, however, is whether the “favour” granted by the employer in this case is improper.

8. In the case of *Coons Heating*, [1978] OLRB Rep. June 525, relied upon by the interveners, the employer in various ways actively set up the organizing of its *existing* employees, first by one trade union and then by another. While a construction case, the pre-existence of the employer's own permanent work force made the case closer to the industrial model, and the Board found that the employer had improperly provided organizing support and influenced the selection of a bargaining agent for its employees.

9. In a similar vein, the interveners cite a number of cases where the deduction and

remittance of union dues prior to the existence of a collective agreement was held by the Board to constitute "other support" within the meaning of section 13.

10. In *Edwards & Edwards*, 52 CLLC 17,027, the employer continued to deduct and remit union dues following notice of a merger between the incumbent bargaining agent and another trade union which had not yet been certified for the employer's employees. After careful consideration of the meaning of section 13, the Board wrote:

"The unfair practice sections of the Act (including section 45 [now 64] which prohibits the type of employer conduct referred to in section 9 [now 13]) are, in large part, designed to safeguard the freedom of employees to join and to bargain collectively through the trade union of their own choice which is granted in section 3. That purpose is furthered by the provisions of section 9 which placed upon the Board the obligation to satisfy itself that no employer has meddled in the affairs of an applicant for certification. The section is clearly aimed at 'company-dominated' trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned. It is argued that because of its explicit language section 9 need only be literally construed and mechanically applied. We suggest that it can properly be interpreted only by reference to what is its obvious intent: to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer."

In light of the *de facto* status of the Union as authorized bargaining agent in its prior form, however, the Board found the prohibitions in section 13 not to apply in this particular case. The Board observed:

"We have taken particular note of the complete absence of any connection between the organizational activities of the applicant and the institution of the check-off. ..."

11. In the very similar case of *Sisman Shoe Co.*, 52 CLLC 17,028, before the Board at much the same time, the *minority* of a 5-man Board strongly rejected this qualified approach to section 13, and observed:

"This section makes clear that the Legislature considered that certain co-operative arrangements between an employer and a trade union who are parties to an agreement are permissible although those same arrangements are prohibited before the trade union becomes entitled to be a party to the agreement. It is clear in the instant case that the respondent's continuance of the irrevocable check-off at the request of the applicant resulted in the imposition of a condition of employment upon individual employees for the benefit of the applicant who was not then a party to a collective agreement with the employer."

The majority went along with *Edwards & Edwards*.

12. There has never been any doubt that the section applied explicitly to *industrial* settings where the very deductions on the part of the employer are used to finance the formation, on company premises, of a new "trade union", and particularly one designed to take away the bargaining rights of an incumbent. See *Crowe Foundary Limited*, [1969] OLRB

Rep. May 218; *Tilco Plastics (1976) Limited*, [1980] OLRB Rep. July 1096. In *Scott Haulage Limited*, [1963] OLRB Rep. January 422, the Board endorsed the record as follows:

“During March, 1962, the applicant held its first organizational meeting and, at this meeting, employees of the respondent signed a document by which they agreed to pay dues out of their earnings to the applicant each month. This document was handed over to the employer and the employer deducted the dues and transmitted them to the applicant for March, 1962, and for each month thereafter. It is clear, therefore, that there was payment to the applicant union of the amounts deducted by the employer from the earnings of its employees before a collective agreement was entered into between the applicant and the respondent and, more particularly, during a period in which General Truck Drivers’ Union Local 938 was the bargaining agent of these employees. In our view this brings the applicant union within the provisions of section 10 of The Labour Relations Act. Having regard to the provisions of section 10 [now 13], we are precluded from certifying the applicant.”

13. The following year, the Board had to consider the application of section 13 in the standard construction context, in *Drywall by Jamieson*, [1965] OLRB Rep. May 99. There the employer had, without the applicant trade union’s awareness, actually contributed money for dues remittances out of its own pocket. While that circumstance clearly rendered the applicant’s membership evidence unacceptable, the Board went on in *obiter* to note:

“It is clear that the applicant understood, at the very least, that the respondent was checking off dues and remitting them to the union. This being an application for certification, it is obvious that the applicant does not have bargaining rights with respect to employees of the respondent affected by this application and equally obvious that it does not have a collective agreement with the respondent covering such employees.”

More importantly, the Board also went on to comment on the peculiar nature of the construction industry in the following terms:

“While we are not entirely unsympathetic to the plea of the applicant that, having regard to the practices and peculiar circumstances in the construction industry, exceptions should be made in cases involving unions and employers in that industry, in the light of the clear cut language of section 10, that plea is one that should be made to some other authority.”

We agree with Mr. Minsky that this potential application of section 13 to the construction industry is affirmed as well in the *obiter* of such cases as *Durable Drywall*, [1970] OLRB Rep. Dec. 906, and *Operative Plasterers’ and Cement Masons (“Capform”)*, [1978] OLRB Rep. April 362.

14. The Board’s approach to what constitutes “other support” to a trade union in the context of the construction industry must now be considered, however, in light of the more recent decision of the Board in *Nicholls-Radtke*, [1982] OLRB Rep. July 1028. In that case the employer had been required by a construction trade union, as is common in that industry, to enter into a collective agreement voluntarily recognizing the trade union before the trade union would agree to supply the employer with men. In two earlier cases, *Sunrise Paving*, 72 CLLC 16,060, and *C. Strauss (1973) Limited*, [1975] OLRB Rep. July 581, the Board had found that the signing of a collective agreement at a time when there were no employees in the bargaining unit constituted “employer support” of the trade union within the meaning of section 48(1) of the Act. Only in the *Strauss* case did the employer go on to hire *existing* members of the trade union under that collective agreement, in the way specifically contemplated by the parties in *Nicholls-Radtke*. In this regard counsel for the trade union that was a party to the impugned collective agreement in *Nicholls-Radtke* (the “intervener” therein) argued:



“The intervener argued that the present case was outside the *Sunrise Paving*, *supra* policy in that, as noted in the Agreement of Facts, the agreement in Exhibit ‘A’ was signed on the understanding that the intervener would supply workers, if and when requested to do so by the respondent, to the project which would be commenced at a later date. From this the intervener argues that the intention of the parties was that the document signed on October 8th was signed with an intention to become effective when the project in question started. Counsel for the intervener argues that there is nothing sinister in these events, that the document was signed in contemplation of members being employed on the project. He argues this is a common practice in the construction industry and that to interpret section 1(1)(e) as requiring employees at the date of signing is a simplistic approach which denies the realities of the construction industry since a number of construction unions take the view that they will only supply members if there is a collective agreement in place.”

15. In considering that argument, the Board reviewed the provisions of section 46(1), relied upon by the interveners in this case, which, once again, sets out the various forms of “accommodation” which may legitimately be provided for in a collective agreement. The Board, however, focussed its attention on subsection 4 of section 46, which provides:

“(4) A trade union and the employer of the employees concerned shall not enter into a collective agreement that includes provisions requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement unless the trade union has established at the time it entered into the agreement that not less than 55 per cent of the employees in the bargaining unit were members of the trade union, but this subsection does not apply,

• • •

(d) *where the employer and his employees in the bargaining unit are engaged in the construction, alteration, decoration, repair or demolition of a building, structure, road, sewer, water or gas main, pipe line, tunnel, bridge, canal, or other work at the site thereof.*”

[emphasis added]

The Board observed:

“It is of course obvious that section 46(4)(d) uses the exact same language as clause 1(1)(f), the definition of construction industry in the Act. Taken together, subsection 1 and subsection 4 of section 46 can be said to contemplate as permissive, provisions in a construction industry collective agreement requiring as a condition of employment membership in the trade union. And further, the structure of subsection 4 seems to indicate that, in the construction industry, compulsory membership or a preferential hiring clause may be inserted into a first collective agreement signed when voluntary recognition creates the bargaining rights which the union holds. If the Act contemplates as permissive conditions in construction collective agreements, preference of employment for union members extending to membership in a trade union as pre-condition of employment, are we to find that the signing of such an agreement in the absence of any other factor is to be interpreted as support for the trade union within the meaning of section 48(a)?

The Board found that it did not, stating at paragraph 13:

“For this Board to hold that, in the circumstances of this case, where no other persons were working or had worked for the employer in the bargaining unit, *and* no other trade union held bargaining rights in respect of that bargaining unit, the agreement is not a valid collective

agreement would have us place a premium on a strict, and technical interpretation of the Act, rather than giving the statute a practical and purposive one, particularly having regard to the common and sensible methods used by employers and trade unions in the construction industry to create bargaining rights without resorting to the certification procedures under the Act."

although the Board also noted at paragraph 11:

"... in a case where the employer recruits employees who are subsequently *forced to join* the union, without a previous history of membership, that may constitute support for the trade union."

[emphasis added]

16. In the context of a voluntary recognition/collective agreement (unlike our own case), the Board also had to be mindful of the provisions of section 60, which states:

"60(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit."

Relevant to that point, the Board at paragraph 11 commented:

"The simple fact is that in the construction industry, the unemployed members in a union's hiring hall have in fact selected their bargaining agent as their union, and once they are referred to a job, that selection normally continues."

The Board then summed up its decision, on the basis of the special characteristics of the construction industry as follows:

"... the employer needed persons to perform work, and the union, which had members available with the skills necessary to do that work, undertook to refer its members to the employer in exchange for receiving voluntary recognition from the employer as exclusive bargaining agent for those persons. In our view this arrangement in the circumstances presently before us is not 'other support' from an employer which calls for the application of section 48 of the Act."

17. In *Nicholls-Radtke*, it should be noted once again, the "accommodation" granted by the employer in return for the supply of qualified men was the signing of a full *recognition* agreement, the provisions of which actually called for *mandatory membership* in the trade union involved. That stands in considerable contrast to our own case, where the employer did not go so far as to grant bargaining rights on his own, and the parties did nothing which compelled employees as a condition of employment to become or remain members of the applicant trade union; nor did the employer agree to deduct dues from any employee other than those voluntarily making that request to the employer in writing. If the Board in *Nicholls-Radtke*, *supra*, felt that the exception for the construction industry in section 46(4)(d) was inconsistent with finding that the signing of a recognition agreement (with mandatory Union membership) violated the intent of the "employer support" provisions, what can we say about

the significantly lesser conduct entered into in the present case? It seems to us that we must find that this also is not conduct which violates the intent of the "employer support" provisions, at least in the accepted circumstances of the construction industry. Particularly where the certification process is relied upon the problem of a section 60 collective agreement is avoided, and the Board is able to satisfy itself *ab initio* that the applicant has filed, as here, properly-obtained membership evidence on behalf of a majority of the employees employed in the bargaining unit as of the "terminal date" fixed for the application. The fact that a greater or lesser number of the employees who came to be employed in the bargaining unit after that date chose to be members of the applicant and have dues deducted is, as in any application for certification, irrelevant.

18. The only remaining question is whether, as the interveners argue, the fact that the employer made a conscious choice for its own commercial reasons to approach the applicant rather than be approached by the interveners, makes a difference. In the circumstances here, we cannot find that it does. The bargaining rights which the interveners were pursuing were alleged to arise strictly by operation of law, in argument before the Board, and that circumstance alone would not, in the Board's view, seem sufficient to deny the respondent the right to "select" a trade union for the supply of men in the way customary to this industry. There may be any number of "commercial" considerations which influence an employer in making that selection, but if such selection is considered lawful in this industry, as we note that it is, the respondent's motives in this case would not appear any more "sinister" in this case than in the variety of other situations in which the "right" to select that source exists. While the present applicant may stand in a special position as a "construction trade union" in the eyes of the "traditional" members of the building trades group, in the eyes of the Board all that matters is that the applicant does operate as a source of men in this industry, and was sought out expressly for that purpose by the respondent in the present case. The principles established by *Nicholls-Radtke* accordingly must apply. On the basis of those principles, we cannot conclude that section 13 is applicable to bar the applicant from certification in these proceedings.

19. The Board finds that the applicant is a "trade union" within the meaning of section 1(1)(p) of the Act.

20. Having regard to the agreement of the applicant and respondent, the Board finds that all construction industry employees of Jen-Ry Utility Contracting Company Ltd. save and except non-working foremen and persons above the rank of non-working foreman, employed in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, to be a bargaining unit appropriate for collective bargaining.

21. On the basis of all of the material before the Board, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on May 3, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

22. A certificate will issue to the applicant.



**DECISION OF BOARD MEMBER B. L. ARMSTRONG;**

1. I dissent.

2. I am convinced that the arrangements made between Whittington and the applicant resulted in a company dominated union - the kind that section 13 of the Act was designed to avoid.

3. The *Nicholls-Radtke* case, relied on by the majority, merely stands for the proposition that in the construction industry a collective agreement can be signed before there are workers on the job. See paragraph 9 of the Board's decision in that case for the policy choice that was made. The case should not be read as a license for employers to promote the union they would prefer to work with. Any "improper favours" will be sanctioned under section 13 or section 48(a). There were no such favours in *Nicholls-Radtke*. The case was merely one of an employer voluntarily recognizing the exclusive bargaining rights of a union in exchange for the union supplying the necessary employees for a project. This is a common practice in the construction industry.

4. The present case is clearly distinguishable from *Nicholls-Radtke* by the ample evidence of improper employer involvement in the affairs of the applicant. I am convinced that Whittington's bookkeeper was acting on his instructions when she initially deducted union dues for the applicant. Whittington and the applicant then made an arrangement for voluntary check-off of union dues at a time when both interveners were seeking bargaining rights. Dues were deducted for the applicant to assist it in obtaining those rights.. This action was clearly contrary to section 13 of the Act. Dues do not have to be remitted to the union for the section to be breached. The deductions were made in the absence of a collective agreement and, therefore, cannot be justified by any provision of section 46. The employer did not simply select a union to supply workers, it gave illicit support to one union to ensure that it received bargaining rights rather than others.

5. I would have dismissed this application for certification because of the employer's support for the applicant.

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**2631-83-R** United Food and Commercial Workers International Union, Applicant, v. **L.M.L. Foods Inc.**, Respondent, v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88, Intervener #1, v. Canadian Union of Restaurant and Related Employees, Intervener #2, and related files

**Bargaining Rights - Collective Agreement - Sale of a Business - Trade Union - Union Successor Status - Constitution amendment void where notice requirement not observed - Purported union merger by executive ineffective where membership wishes not consulted - Vote under s.62(2) not directed to repair procedural defects in attempted merger - Approval of majority of unit required to transfer statutory bargaining rights to successor union - Whether union ceased to exist or abandoned bargaining rights - Whether entity constituting "employer organization" - Whether document signed by employer organization constituting collective agreement - Employers becoming members of employer organization after execution of agreement not bound - Legal and evidentiary onus of establishing sale of business**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *W. G. Donnelly* and *C. A. Ballentine*.

**APPEARANCES:** *A. M. Minsky, Q.C.*, and *M. L. Levinson* for the applicant; *R. B. Cumine* for Cara Operations Limited; *S. McCormack* for all other respondents; *A. Ryder, Q.C.*, for the interveners.

#### **DECISION OF THE BOARD; July 4, 1985**

1. These twenty-four certification applications by the United Food and Commercial Workers International Union ("the UFCW") were filed on various dates between February 10th and May 18, 1984. In each case, the employees affected work in a "Swiss Chalet" restaurant. Each of the respondent employers claimed it was a member of the Swiss Chalet Employers' Association ("the SCEA") bound by the terms of a collective agreement between the SCEA and the Canadian Union of Restaurant and Related Employees (CURRE) dated October 19, 1981 ("the SCEA agreement"), with effect from November 9, 1981 to November 8, 1984. As each of these applications was filed well before the final two month "open period" of the SCEA agreement, the respondent in each case took the position that the application for certification for its employees was untimely by virtue of the provisions of subsection 5(4) of the Act. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88 ("Local 88") filed an intervention in each of these applications, claiming that CURRE had merged with or into it on January 13, 1984, and that it should be treated as the successor to CURRE's bargaining and collective agreement rights. As that claim was challenged by the applicant, interventions were also filed in each application on CURRE's behalf, asserting the rights that CURRE claimed it must still have if Local 88 was not recognized as CURRE's successor.

2. In addition to putting the respondents and interveners to the strict proof of their assertions, the applicant alleged in each case that Foodcorp Limited ("Foodcorp") had assisted CURRE in the original organization and certification of the employees at a number of food outlets then operated by Foodcorp. In particular, it claimed that in 1979 Foodcorp had retained Intertec Security & Investigation Limited to engage and instruct covert operatives who, once hired by Foodcorp to work in various of its outlets, ostensibly as ordinary employees, were

to support and assist CURRE in organizing other Foodcorp employees at those locations. The applicant claimed these activities constituted employer participation and support of the sort contemplated by section 13 and 48 of the Act, which would adversely affect bargaining rights thereafter acquired by CURRE and deprive each of CURRE's subsequent agreements, including the SCEA agreement, of status as a "collective agreement" for the purposes of the Act generally and of the timeliness provisions of subsection 5(4) in particular. The factual and legal issues relating to and arising out of those allegations of employer support came to be referred to in these proceedings as the "Intertec issue". Foodcorp Limited underwent a merger on April 1, 1984, as a result of which the respondent Cara Operations Limited is its legal successor for all purposes. For ease of reference, both Foodcorp Limited and Cara Operations Limited will be referred to throughout as "Foodcorp". The other respondents will be referred to collectively as "the franchisees".

3. The parties to the first several of these applications consented to have evidence and argument in them heard together with respect to common issues. As further applications were filed, the parties to those applications agreed to join in the hearings and be bound by the result. The scope of issues being heard evolved during the Board's first set of hearings, which were held on various dates during the months of March through June, 1984. That evolution was traced in paragraphs 3, 4 and 5 of our decision herein dated September 12, 1984. In the result, the hearing of evidence and argument with respect to the Intertec issue was deferred, and the first series of hearings dealt with the following matters:

- (a) Local 88's claim to be the successor to CURRE under section 62 of the Act;
- (b) UFCW's argument that CURRE was no longer an existing trade union as a result of its failure to effectively merge with Local 88;
- (c) the respondents' and interveners' claim that the SCEA as an "employer organization" as defined by clause 1(1)(j) of the Act;
- (d) the respondents' and interveners' claim that the SCEA agreement was a "collective agreement" within the meaning of the Act;
- (e) in each case, the claim of the respondent and the interveners that the respondent was bound by the SCEA agreement, and that one or other of the interveners had bargaining rights for employees affected by the application.

It was recognized that a later determination of the Intertec issue might affect the last two of these questions, and that our determinations of those questions at the end of the first series of hearings might only be tentative.

4. When hearings resumed September 7, 1984, we read to the parties the text of the decision later released in writing on September 12th, setting out the determinations we had made on the issues of fact and law with which the first set of hearings had dealt, with reasons to follow at a later date. We summarized our conclusions in paragraph 32 of that decision:

32. In summary, we have concluded that:



- (a) Local 88 is not successor to CURRE's bargaining or collective agreement rights.
- (b) Subject to the effect, if any, of a determination of the "Intertec issue", the agreement between the Swiss Chalet Employers Association and CURRE is a collective agreement, the terms of which are binding on the respondents in, and serve as a bar to, the following applications:

Board File Respondent

2628-83-R Cabral Foods Inc.  
 2629-83-R J. Paiva Foods Ltd.  
 2630-83-R Manuel Goncalves,  
                   Restaurateur, Ltd.  
 2631-83-R L.M.L. Foods Inc.  
 2686-83-R L. DeSousa Enterprises Ltd.  
 2688-83-R F. G. Andrioulo Foods Inc.  
 2831-83-R Cara Operations Limited  
 2964-83-R Cara Operations Limited  
 2965-83-R Cara Operations Limited  
 0040-84-R C. Calisto Foods Limited  
 0128-84-R William Odorico Investments Ltd.  
 0129-84-R G. H. Sousa Holdings Inc.  
 0144-84-R Cara Operations Limited  
 0318-84-R Cara Operations Limited  
 0407-84-R D.N.M. Lau Foods Inc.  
 0493-84-R Cara Operations Limited

- (c) The following applications are timely, and neither intervener has established any pre-existing right to represent the employees affected:

Board File Respondent

2766-83-R Dinnerex Inc.  
 2966-83-R Famz Foods Limited  
 0020-84-R Bini Foods Ltd.

- (d) The following applications are timely but, subject to the effect, if any, of a determination of the Intertec issue, CURRE has existing bargaining rights for the employees affected:

Board File Respondent

2830-83-R Famz Foods Limited  
 0336-84-R Famz Foods Limited

- (e) Our determination with respect to the following applications is subject

both to the effect, if any, of determination of the Intertec issue and the resolution of matters discussed in paragraphs 27 to 31 hereof, on which we invite further submissions:

Board File Respondent

2687-83-R 485376 Ontario Limited  
2689-83-R Rahims Food Limited  
2829-83-R 555618 Ontario Ltd.

Elsewhere in the decision we noted our conclusion that CURRE had not ceased to exist as a result of its executive board's ineffective attempt to merge it into Local 88.

5. As we had found them to be timely, the applications referred to in paragraph 32(c) of our decision dated September 12, 1984 were each heard and disposed of individually on September 19, 1984. The further submissions contemplated by subparagraph 32(e) of that decision were heard on September 19, 1984, and evidence and argument on the "Intertec issue" were heard on September 17 and 18, October 11, November 22 and December 17, 18, 19 and 20. In a decision dated February 18, 1985, we set out our decision on those issues, together with our reasons therefor. We found that while Foodcorp had violated the Act in 1979 by covertly supporting CURRE's organizing campaigns at two Swiss Chalet locations, there was no evidence that CURRE had been involved in or at all aware of Foodcorp's activities and that the circumstances did not support the application of sections 13 and 48 to CURRE's past certifications and past and present collective agreements.

6. In our decision of February 18, 1985, we also found that the applications referred to in sub-paragraphs (d) and (e) of paragraph 32 of our decision of September 12, 1984 were timely applications with respect to employees for whom CURRE had existing bargaining rights. The applications referred to in sub-paragraph (b) of paragraph 32 of our decision of September 12, 1984, together with three similar applications filed between July 4 and August 23, 1984, were dismissed as untimely in the decision of February 18, 1985. In this decision we set out our reasons for our decision of September 12, 1984.

## PART II

### CURRE, LOCAL 88 AND THE ATTEMPTED MERGER

#### Facts

7. CURRE was found to be a trade union as defined by the Act in the Board's October, 1978, decision in File No. 1034-78-R, which dealt with the first of a number of certification applications in which CURRE was certified as exclusive bargaining agent for employees of Foodcorp Limited at various of its Swiss Chalet outlets in Ontario. By virtue of section 105 of the Act, that earlier finding was *prima facie* evidence in these proceedings that CURRE is a trade union.

8. The interveners called as their witnesses William Whyte, David Brooks, Seppo Nieminen and Thomas Rees. Mr. Whyte had been employed by CURRE since April, 1980. He became General Manager of CURRE in the fall of 1980 and continued in that capacity until its purported merger with Local 88 in January, 1984. When Local 88 was created for the purpose of effecting that merger, Mr. Whyte also became an Executive Member/Trustee of Local 88. David Brooks was first employed by CURRE in early 1980 to assist Mr. Whyte in organizing Swiss Chalet restaurants. He then became Secretary/Treasurer of CURRE and remained in that position until August of 1983 when he resigned. Mr. Nieminen was a free-lance accountant doing accounting work for CURRE and others when Mr. Brooks resigned in 1983. CURRE's President appointed Nieminen to fill the vacancy created by Brooks' resignation in August of 1983. Mr. Nieminen remained in that full-time position until the purported merger with Local 88, at which point he also became Financial Secretary/Treasurer of Local 88. Thomas Rees has a long history of involvement in various trade union organizations. Most recently he has been involved in the Hotel Employees & Restaurant Employees International Union ("HERE"), working out of its Montreal office. He was appointed an international organizer for that union in January of 1984, and became President of Local 88 when it was created as the vehicle for CURRE's purported merger into HERE.

9. Article 19 of CURRE's original constitution provided that it could not merge, amalgamate with or transfer its jurisdiction to another trade union without the approval of a resolution passed at a special meeting of members by the unanimous vote of all those who were members of the union at the time. The possibility of changing this and other provisions of its constitution was first considered by CURRE in May of 1980. By means of proceedings which culminated on November 27, 1981, CURRE purported to amend Article 19 of its constitution so that it thereafter read as follows:

#### ARTICLE 19 - MERGER AND DISSOLUTION

- (a) This Union may not merge, amalgamate with, or transfer its jurisdiction to another trade union or association unless a SPECIAL MEETING of its members has been convened for the purpose of considering such merger, amalgamation or transfer of jurisdiction, at which special meeting the resolution must be passed by a majority vote of all members of the Union present at the meeting. No less than three (3) days notice of such special meeting shall be given in accordance with the provisions of Article 14 of this Constitution. However, *by unanimous agreement of the executive board of the Union, it is empowered with the authority to merge, amalgamate, or transfer its jurisdiction to another trade union or association without convening a SPECIAL MEETING of its members to consider such merger, amalgamation or transfer of jurisdiction.*

[emphasis added]

10. Discussion of CURRE's possibly merging with other trade union organizations began in late 1980, when Mr. Whyte says he was approached by a UFCW organizer. Whyte met with representatives of UFCW on two or more occasions thereafter. CURRE received a merger proposal from UFCW by letter dated March 9, 1982. This was followed by a meeting in the latter part of 1982, when Frank Benn of the UFCW made a presentation to CURRE's executive. The executive was not receptive, and Benn, in turn, was not pleased with his reception. It was Whyte's evidence that CURRE's executive became "terrified" of Mr. Benn as a result of certain things Benn said at this meeting about the consequences to CURRE of



rejecting merger with UFCW. Merger suggestions continued to come from UFCW, and the executive's terror is said to account for a letter to Mr. Benn of October 1, 1983, under the signatures of the President and Vice-President of CURRE, in which CURRE's response to further correspondence from UFCW on the subject of merger began with the following observations:

As you will recall, at a meeting held some months ago, this matter was discussed at some length and it was subsequently made very clear to Mr. Whyte that, the possibility of such a merger was absolutely unacceptable from our point of view. Moreover, I feel it is only fair to point out to you, that *the relevant sections of our Constitution require the approval of ninety-five percent of our total membership of a merger or amalgamation with any other organization before any such merger or amalgamation can take place.* In light of this, our executive in itself, is not vested with any authority to authorize or effect an amalgamation of the type which you have suggested.

[emphasis added]

That letter went on to draw unfavourable comparisons between UFCW contracts and CURRE's contract with the SCEA, and ended with the suggestion that CURRE was far more competent to represent its members than the UFCW would be. That letter was copied to all CURRE shop stewards. At about the same time, CURRE circulated to employees it represented a "Letter from the President" which accused the UFCW of "trying to bully us into a forced merger of our unions." This letter also referred to discussions CURRE's executive had had with both HERE and the Retail, Wholesale and Department Store Union concerning possible merger or affiliation. At that stage, none of those discussions had led to any acceptance by CURRE's executive of any merger proposal. In late 1983, after CURRE's "Letter from the President" had been circulated, a fourth suitor, the Teamsters Union, appeared on the scene. Whyte felt his initial discussions with representatives of that union were fruitful; by December 15th he felt that a deal had been done and that all that remained was the issuance of a charter and completion of certain documentation. The proposed merger was first mentioned outside the executive board at a meeting of CURRE's shop stewards and business agents in Toronto on December 15, 1983. Whyte could not recall whether he told those in attendance that there had been or that there would soon be a merger with the Teamsters Union. He held a vote of some sort on the subject of that merger. Thereafter, the deal Whyte thought he had made with the Teamsters Union started to fall apart. Terms Whyte and CURRE's executive considered important, terms which had been agreed to by Teamster representatives in earlier discussions, were thereafter rejected by other Teamster representatives. Whyte had had merger discussions with Rees and other HERE representatives off and on since late 1981; the most recent round of discussions had begun in October, 1983, and had died off again the following month. Rees was contacted by CURRE again in early January, 1984. He was told that the executive was then considering merging either with HERE or with the Teamsters Union, that a decision would be made January 13th, and that Rees should be present that day to make his case to CURRE's executive board.

11. CURRE's executive board consisted of the appointed General Manager and the officers of the union. CURRE's purportedly amended constitution provided for four elected officers: President, Executive Vice-President, Vice-President and Secretary/Treasurer. Both the "amended" and original constitutions gave the President the power to make a temporary appointment to fill any vacant executive position pending an annual election. That is how Seppo Nieminen had been appointed Secretary/Treasurer. The office of Executive Vice-President, which had been created by the purported 1981 amendments to the constitution, was

not filled until December, 1983, when William Whyte's brother Jim was appointed to that position by the President. The incumbent President and Vice-President had been elected, CURRE claims, at the annual or "regular" meeting of November 27, 1981. It seems there had been no formal election of officers at the regular meeting in 1982 because, apart from the executive, only three or four members of the union had attended and it had not seemed to the executive that there was much interest in an election at that meeting.

12. At their meeting with Mr. Rees on January 13th, CURRE's executive board reviewed HERE's merger proposal. That proposal called for merger of CURRE into a local of HERE which would be brought into existence for that purpose and would adopt by-laws whose provisions were acceptable to CURRE's executive board and had been pre-cleared with HERE's General President. The executive board then passed the following unanimous resolution:

RESOLUTION OF C.U.R.E. [sic]

WHEREAS the Hotel Employees and Restaurant Employees International Union has agreed to issue a charter to the Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88.

AND WHEREAS attached to this Resolution are the by-laws agreed upon for Local 88 subject to such amendments as may be properly enacted by the membership of Local 88 from time to time.

AND WHEREAS this Executive Board is empowered by Article 19 of the constitution of CURE to merge with and to transfer its jurisdiction to another trade union.

AND WHEREAS C.U.R.E. desires to merge with H.E.R.E. and become a Local thereof.

THEREFORE it is resolved that:

(1) C.U.R.E. shall merge into the Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88 so that the rights, obligations and membership of C.U.R.E. shall become the rights, obligations and membership of Local 88.

(2) In order to effect the merger, Bill White and I are hereby authorized on behalf of C.U.R.E. to complete the application to H.E.R.E. for a charter and by-laws governing Local 88 and to take all other steps necessary to complete the merger.

(3) The merger shall take effect as of the date on which the charter to Local 88 is issued and its by-laws adopted.

Those present then completed a charter application form supplied by HERE. As HERE's constitution required that that application be signed by twenty-five or more persons, Mr. Whyte went out to a nearby Swiss Chalet restaurant to obtain additional signatures. Upon Whyte's return, Seppo Nieminen made out and gave Rees a CURRE cheque in the amount of the charter application fee required by HERE. Rees and Whyte then placed a long distance telephone call to the General President of HERE, who was in Palm Springs, California, attending a meeting of the HERE executive. Rees advised the General President that he had in hand a completed charter application form and application fee, and that the CURRE executive had approved the proposed merger Rees had earlier discussed with him. In response, HERE's General President advised Rees that the draft by-laws had been approved and that a

charter was being issued in the name of the Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union Local 88, effective immediately. A charter dated January 13, 1984, was eventually received by Rees which, apart from some typographical errors of no consequence, confirms Rees' testimony in this regard. Upon completing this telephone conversation, Rees called a meeting of the newly formed Local 88. Those present signed membership applications into Local 88 and paid the required \$1.00 initiation fee. The previously prepared by-laws were adopted as by-laws of Local 88 by vote of the new members, who then elected officers and unanimously passed a resolution to the effect that the executive board be instructed "to accept merger of CURRE." The new executive board of Local 88 then met and, pursuant to a special provision of the newly adopted by-laws of Local 88, accepted the merger of CURRE into Local 88. The foregoing evidence satisfied us that Local 88 was a trade union within the meaning of paragraph 1(1)(p) of the *Labour Relations Act*, as we noted in an interim decision dated July 23, 1984, in Board File No. 2628-83-R.

13. The applicant took the position that the purported merger between CURRE and Local 88 was not effective. Applicant's counsel offered a number of alternative grounds on which that conclusion might be based, but the most serious and substantial of those arguments was that CURRE had not followed the procedures prescribed in its constitution when it set out to amend that constitution to provide for executive board approval of mergers. Articles 7 and 14 of the constitution in effect at the time of the purported amendments provided as follows:

#### ARTICLE 7 - AMENDMENT OF CONSTITUTION

- (a) This Constitution may only be amended in accordance with the following procedures:
  - (i) A member desiring an amendment shall present, at a regular meeting of the Union, a NOTICE OF MOTION setting forth the proposed change. The NOTICE OF MOTION shall be given orally to the assembly and in writing to the Chairman and it shall be recorded in the minutes of the meeting.
  - (ii) The said NOTICE OF MOTION shall be included in the official notice of the next regular meeting, as part of its agenda.
  - (iii) At the regular meeting immediately subsequent to the meeting at which the said NOTICE OF MOTION was given, the member who tendered it shall present its motion, orally to the assembly and in writing to the Chairman, who shall cause it to be recorded in the minutes of the meeting. The motion may be considered by the assembly only after it has been seconded by two (2) other members, failing which it shall be neither discussed nor voted upon. A motion to amend this Constitution shall not pass unless it receives in its favour a seventy-five percent (75%) majority vote of members in attendance at the meeting.

#### ARTICLE 14 - MEETINGS

- (a) A regular meeting of the members of the Union shall be held once every twelve (12) months, except as otherwise provided herein, at a date, time and place to be determined by the President and/or Executive Board. Normally the regular meeting will be held in November.
- (e) Every official NOTICE of a regular or special meeting of the members of the Union shall be posted in a location where it is most likely to come to their attention. Each



such NOTICE shall be printed or typed and shall clearly state the date, time and place of the meeting, and it shall also contain an agenda setting forth the business to be dealt with thereat. In the case of a regular meeting, the notice shall be for a minimum of seven (7) days prior to the scheduled date of the meeting. Notice of a special meeting shall be posted for a minimum of four (4) days prior to the scheduled date of the meeting. Where a special meeting is scheduled to consider business that will be of concern to the Union as a whole, the notice shall be posted for a minimum of seven (7) days.

Evidence with respect to the amendment process focused on meetings held on three dates: October 29, 1980, November 12, 1980, and November 27, 1981.

14. The evidence of CURRE's witnesses was that they called a special meeting of the union on October 29, 1980 by notices posted in the various locations where members of CURRE were employed. Each notice set out a brief agenda; one of the items was "changes to the constitution". On the instructions of Tony Michael, a lay adviser retained by CURRE to advise it with respect to constitutional changes, a total of three meetings took place on the evening of October 29th. At the first such meeting, one of the members in attendance presented the following Notice of Motion:

I Sandy Hoffman move the following Notice of Motion that the General Manager and the Officers of the Union are hereby authorized to be the committee to review the Constitution and needed Amendments which will be presented to the November 12, 1980 Regular Meeting for approval.

The first meeting then adjourned, and a second meeting was immediately convened, at which the Notice of Motion was read for a second time. That meeting was then adjourned, and was followed by the third meeting of the evening, during which the witnesses say there was some discussion about the changes which might be made to various of the articles of the existing constitution. The Hoffman Notice of Motion was then read for the third time that night, and the Minutes of the third meeting record that it was "accepted as read by all members present." The meeting then considered other matters, and was later adjourned.

15. The meeting of November 12, 1980 was said to be a "regular meeting" of which notice had been given by posting notices on bulletin boards at the places of work of employees represented by CURRE. On the question of constitutional changes, the Minutes of that meeting record that the Minutes of the special meeting held on October 29, 1980, were read and accepted as read. Minutes of that meeting recite that:

A motion was made by Linda Croteau, "That the question of amendments to the Constitution to be presented at this meeting be referred to the Executive Board and the General Manager for final amendment in accordance with the Notice of Motion of October 29, 1980." The motion was seconded by Sandra Hoffman and Litsa Mourelatos, the motion carried.

Although there is no reference to it in the Minutes, Mr. Whyte and Mr. Brooks both claimed that the wording of proposed amendments to the constitution, which they say had been reduced to writing by that time, was read out verbatim at this meeting.

16. November 27, 1981 is the date on which CURRE claims its next regular meeting was held. Despite constitutional provisions requiring that copies of notices of meetings be maintained, CURRE and its officers were unable to produce any copy of the notice they allege was given for that meeting. Whyte testified that notices for that meeting must have been prepared by Brooks and sent by mail to shop stewards, who would have been asked to post

them. Whyte conceded he did not post those notices, nor did he recall seeing them posted. He did not recall what was in the notice, other than the time and place of the proposed meeting. Brooks claims he did prepare a notice, which he said included an agenda setting out the matters to be discussed, and indicated that those would include “proposed changes to the constitution”. However, he recalled that the notice did not make reference to the section or paragraph numbers affected, did not refer to the Hoffman Notice of Motion of October 29, 1980, and did not identify or describe the proposed changes in any way. Brooks recalled that he had personally attended to the posting of these notices in Swiss Chalet locations in Ontario. Notices to employees CURRE represented at locations in other provinces were sent to the various business representatives who looked after CURRE’s interests in those provinces.

17. Brooks said sixteen to eighteen CURRE members were present at the regular meeting of November 27, 1981. He described this as one of the better attendances at a regular meeting. Insofar as they refer to constitutional matters, the Minutes of that meeting record:

The meeting then moved to the next order of business under the heading of Old (Unfinished Business). A motion was made by Linda Croteau that members present should ratify the Constitution with its several amendments, being first read and explained to the members present. The motion was seconded by David Brooks and April Kennoway. Motion carried.

Mr. Whyte then read the Constitution [sic] amendments to the members present. Article [sic] amended were 2(a), (b), 6(b), 9, 10 (ii), 12(a) (c), 19(a).

A motion was made by April Kennoway that members present ratify the new Constitution. The motion was seconded by Grace Thom and David Brooks. Motion carried.

Brooks acknowledged that very few of CURRE’s members, if any, would have had copies of its Constitution in October of 1980. There was no evidence that that situation was any different in November of 1981, or at any time thereafter. CURRE did not have a regular procedure for circulating Minutes of the regular or special meetings to its members. Brooks indicated that CURRE represented fifteen hundred to sixteen hundred employees in 1980, a figure he said had risen to over seventeen hundred when Brooks left CURRE in August of 1983. Before the unavailability of copies of the CURRE constitution became an issue in the organizing campaign waged by UFCW, CURRE had few requests for such copies; CURRE generally responded to any request for a copy of its constitution with a suggestion that the person making the request meet with an officer of the union to review the constitution and discuss any questions he or she might have about it.

### Argument

18. Counsel for the interveners relied on the 1981 amendment to Article 19(a) of CURRE’s constitution as providing the authority for the approval of a merger by unanimous resolution of CURRE’s executive board. He acknowledged that in effecting this amendment CURRE did not comply with the specific notice requirements of Article 7(a)(ii) of its constitution. He argued, however, that the issue was not whether that article had been complied with in 1980 and 1981, but whether the Board should, in 1984, “strike down” the 1981 amendments. He submitted that the procedures adopted by CURRE for the amendment of its constitution were taken in good faith, that no member had challenged the validity of the amendments at the time, and that no one except the UFCW and its supporters had challenged the validity of those amendments since. Counsel cited *Re Canadian Temple Cathedral of the*

*Universal Christian Apostolic Church*, (1971) 21 D.L.R. (3d) 193 (B.C.S.C.) for the proposition that the doctrine of laches may be invoked against those who delay an attack on the sufficiency of notice of proceedings taken to enact constitutional provisions. He cited *Pelech v. Ukranian Mutual Benefit Association of St. Nicholas of Canada*, [1940] 4 D.L.R. 342 (Man. K.B.) for the proposition that constitutional changes are a matter of "internal management", with which courts will not interfere when it is alleged that insufficient notice had been given of proceedings taken to effect constitutional changes. He cited this Board's decision in *Goldcrest Products Limited*, [1973] OLRB Rep. Aug. 436 for the proposition that this Board will not interfere where it is alleged that proceedings are without constitutional authority. He relied also on *Public Utilities Commission of the Borough of Scarborough*, [1982] OLRB Rep. Apr. 609, where the Board took particular note of the fact that none of the members of the newly formed applicant trade union had challenged the constitutionality either of the initial installation of only four of the nine officers contemplated by its constitution or of the administration of the trade union's affairs by those officers pending the trade union's first convention. Counsel for Local 88 and CURRE asked us to find that there had been a merger, and to issue the appropriate declaration pursuant to section 62 of the *Labour Relations Act*.

19. Counsel for the applicant argued that the result of CURRE's failure to follow the notice provisions of Article 7(a)(ii) was that CURRE's constitution had not been amended so as to give the executive board authority to effect a merger; consequently, the steps taken by the executive board on January 13, 1984, had not accomplished a merger, and counsel submitted that the Board should so declare. In answer to the contention that proceedings for the amendment of a constitution are matters of internal management with which courts will not interfere, counsel cited *Cordiner v. Ancient Order of United Workmen of the Province of Ontario*, [1912] O.W.N. 549 (Ont. Div. Ct.), *Faulds v. Hesford*, (1957) 23 W.W.R. 625 (B.C.S.C.), *Howard v. Parrinton*, (1971) 21 D.L.R. (3d) 395 (Ont. H.C.) and *Astgen v. Smith*, [1970] 1 O.R. 129, 69 CLLC 14,198 (Ont. C.A.), all cases in which courts have intervened to strike down proceedings taken by trade unions without properly complying with the provisions of their constitutions. Counsel noted that the Board was not faced with a question of declining to interfere, but with a claim for affirmative relief under section 62 of the *Labour Relations Act*. He argued that the interveners had not made out a case for relief under that section. He cited *Beef Terminal Limited*, [1971] OLRB Rep. May 300, *Navco Food Services Ltd.*, [1971] OLRB Rep. June 326, *Zehrs Markets*, [1977] OLRB Rep. Oct. 637 and *Zehrs Markets*, [1978] OLRB Rep. Jan. 86 in support of his submission that this Board requires satisfactory proof of compliance with constitutional notice provisions when faced with a claim for a declaration of successorship under section 62 of the Act. Counsel noted that the notice provisions of CURRE's constitution were virtually identical to the provisions considered in *Standard Tube Canada Ltd.*, [1976] OLRB Rep. July 375, where non-compliance with such provisions was fatal to the validity of the constitutional amendment relied upon as authority for a merger.

20. Counsel also submitted that the merger transactions of January 13, 1984, would have been improper even if Article 19(a) of the constitution had been properly amended, because of what counsel argued was a general requirement in the Board's jurisprudence that notice be given of merger transactions. In this regard, counsel relied on *Astgen v. Smith*, *supra*, as well as comments of the Board in *Beef Terminal Limited*, [1970] OLRB Rep. Apr. 75, *Standard Tube*, *supra*, at paragraph 11, *Zehrs Markets*, [1977] OLRB Oct. Rep. 637 at paragraph 16, *Children's Aide Society of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 24 at paragraph 11 and *Trans-Nations Incorporated*, [1981] OLRB Rep. Sept. 1298 at paragraph 22. This general



notice requirement had not been met with respect to a proposed merger with HERE, counsel argued. Indeed, CURRE's members were informed, by copies to their stewards of its letter to UFCW, that no merger could be effected without a 95% membership vote. In response to the argument that no challenge had been taken at the time of the constitutional amendments, counsel for the applicant submitted that there was no reason to suppose that anyone outside of the executive was fully aware of the changes in question. He noted that the *Canadian Temple* and *Pellock* cases were both concerned with the rights of shareholders or members of incorporated entities, whereas here we were concerned with the rights of members of an unincorporated association. As for CURRE's reliance on the doctrine of laches, counsel for the applicant argued that this Board could not apply the doctrine as it does not have the powers of a court of equity, citing *Re Libby, McNeil & Libby of Canada Ltd.* (1979) 91 D.L.R. (3d) 259 at 281 and *Re Brayshaws Steel Ltd.*, [1972] 2 O.R. 549 at pages 555-557.

21. Counsel for the interveners responded to the argument for a super-added notice requirement by drawing to the Board's attention the fact that the constitution in question in *Trans-Nations Incorporated*, *supra*, gave the General President of International Union the power to effect a merger of two of its locals without any notice to anyone connected with either local. He relied also on the Board's decision in *Waterloo Spinning Mills Ltd.*, [1984] OLRB Rep. March 542 at paragraph 35, where the Board noted that the *Labour Relations Act* contains no requirement for internal union democracy. In any event, counsel argued that members would have had notice of the possibility of a merger with HERE by means of the "Letter from the President" circulated in the fall of 1983.

### Reasons for Decision

22. In paragraph 7 of our decision of September 12, 1984, we said:

7. The Board finds that the attempt by the executive board of CURRE to cause CURRE to merge into Local 88 was legally ineffective, and the Board declares that Local 88 has *not* acquired CURRE's rights, privileges and duties under the Act.

Our reasons for that decision begin with some general observations about trade unions and their rights, privileges and duties under the *Labour Relations Act*.

23. The *Labour Relations Act* deals with what its preamble describes as "the practice and procedure of collective bargaining between employers and trade unions as the *freely designated* representatives of employees" (emphasis added). Under the practice and procedure elaborated by the substantive provisions of the Act, employees in a "unit of employees that is appropriate for collective bargaining" have the collective right to have a trade union selected by the majority act as representative of all of them in collective bargaining with their employer. Once selected by a majority of the persons employed in a unit at a particular time, a trade union ordinarily remains the representative or bargaining agent of every person thereafter employed by that employer from time to time in that unit until such later time as a majority of the persons then employed in that unit choose to terminate its representation or select another trade union as their representative. When we speak of a trade union having bargaining rights for or with respect to a unit of employees, we mean that, from the perspective of and in accordance with the provisions of the *Labour Relations Act*, the trade union has acquired and enjoys for the time being the right to act and be recognized by their employer as the exclusive bargaining agent of all employees in that bargaining unit. The Act imposes on all employers

and all trade unions obligations designed to protect from interference the individual right of employees to freely participate in the selection of a bargaining agent for the unit in which they are employed. That right is, by necessary implication, a personal right, one which employees cannot be obliged by contract to refrain from exercising or to exercise in any particular way.

24. The Act defines "trade union" as "an organization of employees formed for purposes that include the regulation of relations between employees and employers" (clause 1(1)(p)). The Act contemplates that such an organization will have "officers", "officials", or "agents" who act on its behalf, and that employees will be able to apply for membership in it. These are characteristics shared by unincorporated associations and certain types of corporations. For the most part, trade unions in Ontario are unincorporated associations whose legal characteristics were described by Evans, J. A. (as he then was), in the following extracts from his judgment in *Astgen et al. v. Smith et al.*, [1970] 1 O.R. 129, 69 CLLC 14,198 (Ont. C.A.) at pp. 133-134 and 135:

Prior to dealing with the merger agreement I consider it desirable to determine the precise legal status of a trade union or labour union, the relationships existing among the membership *inter se* and the relationships of each member to the totality of the persons associated together. I concede at the outset that a labour union under the *Labour Relations Act*, R.S.O. 1960, c. 202, and allied legislation has a "status" conferred by such legislation which makes it somewhat different from a fraternal organization or an athletic club but apart from such statutes a labour union is essentially a club, a voluntary association which has no existence, apart from its members, recognized by law. A club is basically a group of people who have joined together for the promotion of certain objects and whose conduct in relation to one another is regulated in accordance with the constitution, by-laws, rules and regulations to which they have subscribed.

The proposition that a trade union has a special status, that it is a sort of hybrid corporation, has no foundation in law. This misconception is fostered by the "legal entity" character which labour legislation has thrust upon trade unions but is not legally supportable outside the purview of those statutes. While trade unions have historically strenuously opposed and rejected any movement toward corporate status with its attendant strictures, there has evolved a concept, which has no basis in law, that unions have a *quasi*-legal entity; that they have a peculiar status which clothes them with the advantages of corporations but shields them from the restrictions and liabilities attaching to corporate entities. The misunderstanding, and it is a fundamental one, must not be allowed to becloud the issues herein.

We are not concerned in this appeal with the pseudo-corporate status bestowed on labour unions by statute; nor are we assisted by English case law in view of the fact that under various Trade Unions Acts, trade unions in England may be registered and upon registration are vested with certain powers and responsibilities. Ontario has no comparable legislation and resort must be had to the common law to determine both status and capacity. Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelled out in the memorandum of association usually referred to as the "constitution"; the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of Mine Mill, *Rand, J., in Orchard et al. v. Tunney*, [1957] S.C.R. 436 at p. 445, 8 D.L.R. (2d) 273 at p. 281, stated:

... each member commits himself to a group on a foundation of specific terms governing

individual and collective action ... and made on both sides with the intent that the rules shall bind them in their relations to each other.

I adopt also the proposition stated by Thompson, J., in *Bimson v. Johnston et al.*, [1959] O.R. 519 at p. 530, 10 D.L.R. (2d) 11 at p. 22, which was affirmed on appeal [1958] O.W.N. 217, 12 D.L.R. (2d) 379:

... that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the union's constitution and by-laws ... The contract is not a contract with the union or the association as such, which is devoid of the power to contract, but rather the contractual rights of a member are with all other members thereof.

• • •

There is no limit to the lawful objects for the furtherance of which men may associate voluntarily, and in my view, provided it is properly authorized by every member of the association, there is no restriction upon the powers of the members to alter the objects for which they became associated or to terminate the relationship *inter se* of those associated, or to agree individually to become bound by other contractual relationships to the members of the same or some other group of associates. In this sense of the meaning of *ultra vires* I do not consider that the realization of what was contemplated by the provisions of the merger agreement would be beyond the capacity of the members of Mine Mill provided that there was unanimous approval individually or by means of some procedure which all of the members had agreed upon.

The contract of association is not between the members and some undefined entity which lacks the capacity to contract; it is a complex of contracts between each member and every other member of the union. These are individual contracts impressed with rights and obligations which cannot be destroyed in the absence of the specific consent of each person whose rights would be affected thereby.

25. Trade unions which are employer dominated, or which engage in discrimination on prohibited grounds, cannot acquire or assert bargaining rights which will be recognized under the Act (see sections 13 and 48). Beyond that restraint and the implied requirement that it have a constitution, officers and employee "members", the *Labour Relations Act* does not prescribe or regulate the form of a trade union's internal organization, or the content of its constitution. For historical and practical reasons, typical trade union constitutions provide for what they would describe as a "democratic" structure, in which members have some say both in the selection of those who act on its behalf and in the decisions and actions ultimately taken. "Democratic" structure is not, however, a requirement of the *Labour Relations Act*: see *C.S.A.O National (Inc.) v. Oakville Trafalgar Memorial Hospital Association et al.*, [1972] 2 O.R. 498; (1972) 26 D.L.R. (3d) 63 (Ont. C.A.); and, *Canada Trust Mortgage Company*, [1976] OLRB Rep. Oct. 596 at paragraph 15. With certain limited exceptions (the requirements of sections 82, 84, 85 and 86, for example) the Act does not provide for supervision of the relationship between a trade union and its members as such or, more accurately, of "the complex of contracts between each member and every other member of the union." The focus of the Act is on the trade union's entitlement to represent employees in a bargaining unit or units and on the trade union's activities in that representative role. Of course, at least some of the employees in a bargaining unit will ordinarily be or have been members of the trade union which represents them. Some of the members of a trade union will ordinarily be or have been employees in a bargaining unit the union is or was entitled to represent. In the case of a trade union which represents only a single unit of employees of one employer, its members and the employees in the bargaining unit it represents may be all or nearly all the same people.



Nothing in the *Labour Relations Act* requires or anticipates that result, however; that is why it is important in analyzing the Act to bear in mind that its primary focus is on the trade union in its character as an agent of bargaining unit employees, rather than on its internal structure and the inter-relationships of its members.

26. The right to serve as exclusive bargaining agent for a bargaining unit of employees is personal to the trade union which acquires it, just as the right to select or terminate the union as their representative is personal to the employees in the unit. If a trade union ceases to exist, its bargaining rights and any collective agreement to which it is party will also cease to exist: *Board of Light and Heat Commissioners of Guelph*, 52 CLLC 17,024; *Glass Guild Limited*, 53 CLLC 17,057. Prior to the enactment in 1956 of the first of the predecessors of section 62 of the *Labour Relations Act*, the same principle applied when a trade union lost or changed its identity in the process of a merger or transfer of jurisdiction: *Deloro Smelting and Refining Company Limited*, 56 CLLC 18,037; and see *Oliver Cooperative Growers Exchange v. Labour Relations Board*, (1962) 32 D.L.R. (2d) 440 (B.C.C.A.), rev'd on other grounds *sub. nom. Labour Relations Board of B.C. et al v. Oliver Co-operative Growers Exchange*, (1962) 35 DLR (2d) 694, 40 W.W.R. 333, 62 CLLC 15,428 (S.C.C.). The members of a trade union may take effective proceedings to transfer collective contractual and property obligations *inter se* to a larger group. They cannot, in their capacity as members of the trade union, effectively convey to another entity the rights and obligations of that union as bargaining agent for a unit or units of employees, any more than a trustee or agent can transfer his trust or agency to another without the agreement of his *cestuis que trust* or principals. Of course, a trade union may undergo internal changes without losing or changing its identity. For example, changes of affiliation which involve no relinquishing, acceptance or imposition of control by any parent organization do not threaten the continuity and existence of bargaining rights: *Hydro Electric Power Commission of Ontario*, 57 CLLC 18,080; *Navco Food Services Limited*, [1971] OLRB Rep. Feb. 80. Mergers, amalgamations and transfers of jurisdiction can and do have such an effect, however, and that is why provision is made in section 62 of the Act for the Board to consider whether, when a bargaining agent has engaged in such a transaction, the "successor" should be permitted to act as bargaining agent for a unit of employees without securing the right to do so through certification or voluntary recognition.

27. Section 62 of the *Labour Relations Act* provides:

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceedings, before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

It is apparent from the language of the section that no question arises under it unless there has in fact been an effective merger, amalgamation or transfer of jurisdiction as a result of which it can be said that one trade union has in some sense become the “successor” of another. The constitutionally appropriate decision-making bodies of the predecessor and successor may each have so acted as to make the latter the successor to the former’s property and contractual rights, and to have the web of contractual membership relationships of the latter replace or succeed that of the former. In that sense a trade union may establish it is the “successor” of another. Unlike the “successorship” provided for in section 63 of the Act, however, succession to a predecessor trade union’s statutory and collective agreement rights and obligations does not follow automatically as a result of the predecessor and successor having engaged in a particular kind of transaction. Section 62 contemplates that a trade union which can be described as “successor” to another by way of merger, amalgamation or transfer of jurisdiction may not, despite that transaction, be found entitled to a declaration that it has acquired the statutory rights, privileges and duties of its predecessor. It is clear from the use of the word “successor” in the phrase “may declare that *the successor has or has not ...* acquired the rights, privileges and duties under this Act of its predecessor ...” (emphasis added) that the word “successor” is used in two different senses in section 62. One sense is as successor to contract and property rights recognized at common law and effectively conveyed by the predecessor; “successor”, that is, in the sense that commercial law may recognize one unincorporated association as successor to the rights and obligations of another. The other sense is as successor to statutory rights. Section 62 clearly contemplates that a trade union might succeed in the first sense without succeeding in the second. This distinction was quite clear in the early Board decisions interpreting the predecessors of section 62.

28. The Board’s practice on applications under what is now section 62 was described in the *Hydro-Electric Commission of the City of Hamilton*, 63 CLLC 16,261 in the following terms:

The practice of the Board has been to inquire whether the predecessor trade union has exhibited the desire and has taken the necessary steps to effect the merger, amalgamation or transfer of jurisdiction. The Board must also be satisfied that a majority of the employees in the bargaining unit concerned, have given their approval to the action of the predecessor trade union. The successor trade union must also have exhibited a desire and taken the necessary steps to merge or amalgamate with or accept the transfer of jurisdiction over the bargaining unit.

The Board must be satisfied that the parties have substantially met these requirements and that the employees concerned are not opposed to the merger, amalgamation or transfer of jurisdiction.

The Board’s early decisions recognized that the granting of a declaration of successor status required more than the mere desire of employees in a bargaining unit to change their bargaining agent: *Falconbridge Nickel Mines Ltd.*, [1960] OLRB Rep. May 73. The predecessor and successor trade unions must both have been willing to effect a merger, amalgamation or transfer and must have taken the necessary steps to accomplish that end; otherwise, the displacement of one by the other would properly be effected only by timely certification proceedings. The Board has no jurisdiction to make the declaration contemplated by section 62 unless it is first satisfied that a merger, amalgamation or transfer of jurisdiction *has* occurred, and that will not be so if persons or membership bodies within the predecessor and successor have purported to effect such a transaction without constitutional authority: *Zehrs Markets*, [1977] OLRB Rep. Oct. 637 at paragraph 10; *Children’s Aide Society of Metropolitan Toronto*, [1980] OLRB

Rep. Jan. 24 at paragraph 2; *Trans-Nations Incorporated*, [1981] OLRB Rep. Sept. 1298 at paragraph 22; *Jaegar Machine Company of Canada Ltd.*, [1983] OLRB Rep. July 1082 at paragraph 11; *Brewers Warehousing Company Limited*, [1974] OLRB Rep. July 461.

29. In assessing a predecessor's compliance with the terms of its constitution in effecting a merger, amalgamation or transfer of jurisdiction, the Board must consider whether the constitutional provisions relied upon by the predecessor properly formed part of its constitution at the time of the transactions in question. That very issue was addressed by the Board in *Standard Tube Canada Limited*, [1976] OLRB Rep. July 375. In that case, merger of the predecessor and successor had been approved by a majority of votes cast at a meeting of members of the predecessor. The predecessor and successor relied on that vote as having satisfied the terms of a provision for merger which had been introduced into the predecessor's constitution by a prior purported amendment. The provisions of the predecessor's constitution respecting constitutional amendment and notice of meetings were identical in all material respects to the provisions of Articles 7(a) and 14(f) of CURRE's constitution; they required that any constitutional amendment be the subject of at least two regular meetings, and that the text of any proposed amendment be set out in the notice of the second meeting. As in this case, the predecessor in the *Standard Tube* case failed to set out the text of the proposed amendment in a notice of the second meeting at which it was to be considered and enacted. Indeed, in *Standard Tube* no written notice was given of that second meeting. The Board found that the predecessor's failure to comply with these notice provisions was fatal to the validity of the constitutional amendment and, hence, fatal to the application for a declaration with respect to the merger whose efficacy depended on the validity of that amended constitutional provision.

30. Our examination of the steps taken by CURRE to amend its constitution was not a matter, as the interveners argued, of deciding whether or not to "strike down" the amendments in question. The issue we had to address was whether those amendments had ever been effectively made, having regard to the law which governs the conduct of the affairs of unincorporated associations. In that regard, we were prepared to assume that the law will relieve against mere technical deficiencies when there has been substantial compliance with the spirit of existing constitutional provisions. A requirement that a notice of meeting set out the business intended to be transacted at that meeting is not, however, a mere technical requirement. Members receiving notice of a meeting will appreciate that they may be bound by the actions of those who attend the meeting. Notice of the business to be transacted is important to each member's decision whether or not he or she should attend the meeting to participate in and attempt to influence deliberations on matters of importance to him or her. Some subjects of discussion are more fundamental or important than others. Some constitutional amendments will be more important to members than others. Matters involving merger, amalgamation or transfer of jurisdiction are commonly considered very fundamental and very important to members. This may explain the comments of the courts and panels of this Board to the effect that express notice that merger is under consideration may be implicitly required even if there is no express constitutional requirement for detailed notice. Here, however, it is not necessary to imply any notice requirement; the requirements of CURRE's constitution were quite specific: no constitutional amendment could be effected except at a meeting for which notice had been properly given setting out the precise text of the proposed amendment.

31. It is not clear how many members CURRE had at the time notice was or ought



to have been given for the meeting of November 27, 1981. The number of employees it purported to represent exceeded fifteen hundred. Most of those would have been in Ontario and the collective agreement which the intervenor claims covered all such employees required that they be members of CURRE. In the absence of complete compliance with the provisions of its constitution, not even a substantial fraction of CURRE's members could have known that anyone was seeking to so amend CURRE's constitution as to place in the hands of its executive board the power to select the organization in which they might in future have membership obligations. In the circumstances, the relative handful of people said to have attended the meeting of November 27, 1981, proceeded without constitutional authority in purporting to effect any amendment to CURRE's constitution. Whatever may have been done at that meeting was simply ineffective, as a matter of law, to bind members of CURRE not present. If any general notice was given of that meeting, a matter about which we were left in some doubt, and if that notice did refer, without particularity, to a proposed constitutional change, we were satisfied that the notice was insufficient to satisfy either the letter or the spirit of the prerequisites to amendment prescribed by CURRE's constitution. Accordingly, we found that there had not been a merger, amalgamation or transfer of jurisdiction by which Local 88 became the successor of CURRE in any sense relevant to the application of section 62.

32. Counsel for the interveners suggested that we might exercise our discretion under subsection 62(2) to order a representation vote if we found that the steps taken to effect the merger of CURRE and Local 88 were incomplete. We determined we would not do so. Even if a representation vote disclosed majority support of Local 88 in any of the affected bargaining units, that would not alone be a sufficient basis for a successorship declaration with respect to those units: *Falconbridge Nickel Mines Ltd.*, *supra*. There must also be an effective merger, amalgamation or transfer of jurisdiction before there can be any question of one union succeeding to the statutory rights and obligations of another under section 62. A representation vote can be of no assistance in determining whether a transaction had the authorization required by the participants' constitutions when it occurred. Unless the relevant constitution so provided, a representation vote could not repair any inadequacy in the steps taken by the predecessor or the successor to obtain the necessary authorization.

33. The interveners' request that we test the wishes of employees if we found a defect in their merger proceedings stood in sharp and disturbing contrast to their submission that, but for such a defect, CURRE's failure to ask affected employees whether they wished to be represented in future by a Local of HERE should be of no consequence the Board's decision whether Local 88 should be declared the successor to CURRE's statutory right and obligation to represent those employees. In view of that disregard of employee wishes by CURRE's executive, we think it important to observe that the wishes of affected employees are always a relevant concern on an application under section 62. That is very clear from the language of the section itself, and particularly the provision for conduct of representation votes which, as we have noted, can only have the purpose of testing employee wishes. The Board's early decisions, particularly *Hydro-Electric Commission of the City of Hamilton*, *supra*, made it clear that the approval of affected employees was required in addition to approval of the trade unions involved. The then Chairman of this Board quoted *Hydro-Electric Commission of the City of Hamilton* with approval in *Corporation of the City of Brockville*, [1979] OLRB Rep. Feb. 76, and at paragraph 11 reiterated that:

The Board's concern when administering section 54 [now 62] is that both the predecessor and successor trade union have given clear approval of the proposed transaction, *and that is has also been approved by the employees concerned.*

[emphasis added]

34. The language of section 62 of our Act was obviously the model for the nearly identical provisions of section 54 of British Columbia's 1973 *Labour Code*. P.C. Weiler was one of the authors of that Code and served as the first chairman of the Labour Board it created. In the later capacity, Professor Weiler had this to say about that provision in *British Columbia Ferry and Marine Workers' Union et al.*, [1978] 1 Can. L.R.B.R. 17 at pages 19 and 20:

As a matter of policy, the Board's primary concern in applications of this nature will be to ascertain whether the unions involved have consulted the wishes of the workers who are specifically affected by the transfer of jurisdiction. This policy flows from the language of Section 54. . .

An application under Section 54 involves the replacement of one trade-union by another as the certified bargaining agent. Most instances of such replacement are a result of applications for certification pursuant to Section 39(2). The Board's policy on such "raids", where the applicant union satisfies us that it has the support of 50 percent of the membership, is to conduct a representation vote to decide who will be the certified bargaining agent. (See *CAIMAW et al. and Western Canada Steel et al.*, [1974] 1 Canadian LRBR 22.) It might be argued that the Board should follow the same practice in dealing with transfers of jurisdiction under Section 54. However, in the Board's view, the situations are substantially different. In a raid situation one union is seeking to supplant another against the wishes of the incumbent union, while in an application under Section 54 the applicant union is seeking to supplant the incumbent in accordance with a mutual agreement. This element of cooperation places the situation in an entirely different perspective than that posed by a "raid". Therefore, under Section 54, Board policy is not to conduct a representation vote itself when its investigations disclose that the union's internal procedures have given the affected employees an adequate opportunity to express their views and to reach a majority verdict on the transfer.

In our view, the same observations may be made about applications under section 62 of the Ontario *Labour Relations Act*.

35. In this case, the officers of CURRE proceeded with the purported merger without consulting the wishes of the employees CURRE represented. CURRE's executive board simply took the position that it was entitled to effect a merger without consulting those wishes. In answer to the proposition that some such requirement was implicit in section 62, counsel for the interveners cited *Trans-Nations Incorporated, supra*, in which a merger of two local unions had been effected by order of the parent union's General President pursuant to a constitutional provision which authorized such action. A successorship declaration was granted in that case. Counsel offered this as authority for the proposition that the sensitivity of the proceedings of the predecessor and successor unions to the wishes of employees represented by the predecessor was not a matter of concern to the Board in disposing of an application under section 62. We note, however, that while the constitution in issue in *Trans-Nations Incorporated* did not require it, members of the two merged locals *had* been consulted with respect to their wishes before the merger was effected. Indeed, the issue of merger had been the subject of votes in *each* of the individual bargaining units represented by the predecessor. It is apparent that these steps were entirely adequate to satisfy the employee approval test pronounced in *Hydro-Electric Power Commission of the City of Hamilton, supra*, and reiterated in *Corporation of the City of Brockville, supra*. Having regard to its facts, *Trans-Nations Incorporated* can hardly be advanced as authority for the proposition that the Board will grant a successorship declaration following a transaction undertaken without reference to the wishes of employees affected.



36. If we have found that the provision quoted in paragraph 9 of this decision had been properly incorporated into CURRE's constitution before CURRE's executive board purported to approve merger with Local 88 in January, 1984, then we would have found that the two unions had merged at that time. However, in the circumstances of this case that would not have been enough to warrant a declaration that Local 88 had acquired the statutory rights, privileges and duties which, we must remember, CURRE could not simply "convey" to it. Even if its constitution had authorized the action CURRE's executive board took, that would not have changed or diminished the importance of the fact that the wishes of affected employees with respect to representation by a local of HERE were not consulted, either in the course of or apart from steps taken pursuant to CURRE's constitution to secure its approval of and agreement to the merger, before Local 88 made its applications under section 62. But for the interveners' failure to establish that they had merged, in these circumstances we would have ordered representation votes and only declared Local 88 to have acquired the statutory rights and obligations of CURRE with respect to those bargaining units in which representation by Local 88 was approved by a majority of voters.

37. As we found that there had been no effective merger of CURRE into Local 88, in paragraph 7 of our decision of September 12, 1984, we declared that Local 88 had not acquired the rights, privileges and duties of CURRE under the *Labour Relations Act*.

38. The obvious consequence of that declaration was that CURRE retained those rights and privileges and remained subject to the duties referred to in section 62, including any bargaining or collective agreement rights it might have. The applicant argued, however, that CURRE had somehow gone out of existence, so that any bargaining rights it may have had or collective agreements to which it may have been party could not be a factor in the disposition of the applications with which this decision is concerned. From time to time in the course of the hearing, counsel for the applicant put this proposition on the basis that an effective merger of CURRE and Local 88 would have resulted in the dissolution or disappearance of CURRE as a separate trade union, and that that result should be taken as having occurred even if the merger was not effective. That argument was without merit. If the efforts of executive board and other members of CURRE were constitutionally ineffective to achieve the intended merger between CURRE and Local 88, they must equally have been constitutionally ineffective to achieve any particular consequence of merger or an unintended total dissolution of the contractual framework which formed the legal substance of CURRE.

39. In final argument, counsel for the applicant rested his submission that CURRE had ceased to exist on the alternate ground that CURRE's activities, or the lack of them, in the period both before and since the attempted merger, should be treated by the Board as evidencing a disappearance of CURRE or an abandonment of its bargaining rights. Counsel pointed to CURRE's failure to keep up-to-date membership records, its failure to hold an annual meeting in 1983, the doubt about whether there had been any election of officers in 1982 and the fact that any bargaining rights to which CURRE might have claimed prior to January 13, 1984, had since that date been exercised only by Local 88 and its officers, and not by CURRE or its officers. We rejected that argument as well. This is not a case in which what was once found to be a trade union is discovered to be without a constitution, or to have otherwise lost every vestige of an "organization" in the sense that term has employed in the definition of "trade union" in paragraph 1(1)(p) of the *Labour Relations Act*. The facts here are quite distinguishable from those with which the Board was faced in *Allbright Platers*



*Limited*, [1972] OLRB Rep. Aug. 784 and *Footwear Fashions Limited*, [1981] OLRB Rep. Apr. 454, 81 CLLC 16,101. The Board will not lightly come to the conclusion that an organization has ceased to exist. For the purpose of assessing a question of that kind, the Board looks to whether the vestiges of an organization remain and, particularly, whether the organization has officers of some kind continuing to act with apparent authority: *Dutch Laundry and Dry Cleaners Ltd.*, [1968] OLRB Rep. Apr. 45. The evidence of Mr. Nieminen was that none of the officers of CURRE had resigned their offices in that trade union. Most of them became, and at least some of them remained, officers of Local 88. Nieminen testified that once a question was raised about the effectiveness of the merger between CURRE and Local 88, the officers of Local 88 and CURRE agreed that the acts of Local 88's officers and employees would be treated as having been performed on behalf of CURRE if it transpired that the merger had not been effective. At the time of our decision of September 12, 1984, we had no reason to suppose that the persons who formed the executive of CURRE at the time of the purported merger would not do as they had agreed they would do, and ratify any acts performed in the furtherance of CURRE's bargaining rights by officers and employees of Local 88. Even without that express agreement, the hiatus and reason for it were not sufficient for the Board to find that CURRE has abandoned those bargaining rights. It was for those reasons that we reached the conclusion set out in paragraph 8 of our decision of September 12, 1984:

8. The Board finds that CURRE has not ceased to exist or otherwise lost any bargaining or collective agreement rights as a result of the ineffective attempt at merger, any lack of direct action by it (as opposed to action by Local 88) since then, or any failure to comply with provisions of its constitution.

### Scope of CURRE bargaining rights

#### Scope and character of Agreement between CURRE and SCEA

40. As we have already noted, CURRE was certified to represent the employees of Foodcorp Limited at one of its Swiss Chalet Restaurants in October, 1978. Thereafter, CURRE organized Foodcorp employees at other Swiss Chalet restaurants. The history of those efforts up to the fall of 1979 was summarized in our decision of February 18, 1985. By the end of November, 1980, CURRE had been certified as exclusive bargaining agent for employees of Foodcorp Limited at more than thirty of its Swiss Chalet restaurant locations in the Province of Ontario. As we noted in our decision of February 18, 1985, a union now known as Hotel Employees and Restaurant Employees Union Local 75 was certified on October 25, 1979 to represent the employees of Foodcorp at one of its Swiss Chalet restaurants in Scarborough. CURRE displaced that union at that location as a result of a certification application granted March 15, 1983. The only "Swiss Chalet" employer for whose employees CURRE has ever been certified is Foodcorp (now Cara Operations Limited). Apart from the 1983 displacement application at the Scarborough location, the last such certification was granted in November, 1980.

41. In December, 1980, Wanda Paszkowski was hired by Foodcorp to serve as secretary to Allen Morrow, Foodcorp's new Director of Personnel and Industrial Relations. After serving in that capacity for a year, she became a personnel officer and, in August of 1983, Personnel and Industrial Relations Officer. During the hearings prior to our September 12th decision, she was described as Industrial Relations Manager of Foodcorp's successor, Cara Operations

Limited. In those several capacities she has been involved in various aspects of Foodcorp's labour relations, including grievance handling and settlement, preparation for arbitration, and preparation for and participation in collective bargaining. She and other members of Foodcorp's Industrial Relations Department also provide those services to the Swiss Chalet Employers Association and its members.

42. In the course of her testimony before the Board, Ms. Paszkowski identified two documents she had prepared on the basis of her review of documentation available to her in Foodcorp's Industrial Relations Department. One was a summary which sets out, *inter alia*, the date of CURRE's certification (if any) and effective date of the first collective agreement with respect to each of a number of Swiss Chalet locations. The information set out in that document was not challenged. That information, together with Ms. Paszkowski's oral testimony, established that with respect to each of the Swiss Chalet locations for which CURRE was certified to represent Foodcorp employees in the period October, 1978 to November, 1980, Foodcorp and CURRE had subsequently entered into an individual collective agreement with a term of three years commencing on (in most cases) or shortly after (in some cases) the date on which CURRE had been certified for the individual location covered by that agreement. The second document prepared by Ms. Paszkowski and introduced as an exhibit during her testimony summarized further information with respect to those Swiss Chalet restaurant locations with which these hearings dealt prior to September, 1984. Locations at which the employer is not now Foodcorp or its successor, Cara Operations Limited, were said to have been "franchised" to the "franchisee" employer. This second document sets out the date on which each such location was "franchised". In most cases, Foodcorp had been operating a restaurant at that location prior to the "date franchised"; where that is so, the summary provided by Ms. Paszkowski also set out the date the restaurant was originally opened at that location by Foodcorp. In one case the summary shows that two successive franchisees had operated a restaurant at that location. It emerged from Ms. Paszkowski's testimony that two other locations dealt with in her summary had been the subject of franchises earlier than the franchise to the current employer, as we noted in paragraph 27 to 30 of our decision of September 12, 1984. The nature of the transactions by which locations were "franchised" was not explored in any detail in the evidence.

43. Ms. Paszkowski was present, in her capacity as secretary to Mr. Morrow, at a meeting held September 2, 1981, at which the Swiss Chalet Employers' Association was brought into existence. She testified that she prepared the minutes of that meeting. With the assistance of those minutes, she recalled that a form of constitution was presented and accepted by a unanimous vote of Mr. Morrow, representing Foodcorp, and the six other persons present, who she said were franchisees or representatives of a franchisees operating Swiss Chalet restaurants at that time. The minutes record the election of officers and the appointment of Mr. Morrow as General Manager of the Association. Ms. Paszkowski testified that the constitution presented at the meeting was signed by the elected President and Secretary-Treasurer of the Association. Below those signatures, the following entry and original signatures appear:

By attaching our names hereto, we hereby signify our approval of this Constitution and acknowledge that we are bound by its provisions and will conform therewith.

"Bruno Bini"  
#108 Operating as  
Swiss Chalet Bar B.Q.

"Diniz DoCouto"  
#133 Operating as  
Swiss Chalet Bar B.Q.

"Sam Rahim"  
#121 - Rahim Foods  
Limited

"Charles Cianchino"  
#139 Operating as  
Swiss Chalet Bar B.Q.

"Jose Goncalves"  
#123 - 485376 Ontario  
Limited

"Neil Surujnarain"  
#150 Operating as  
Swiss Chalet Bar B.Q.

"Allen A. Morrow"  
Foodcorp Limited

A second document purporting to be a constitution of the SCEA was also filed with the Board. Like the document which Ms. Paszkowski said was examined at the founding meeting, this second document bears the following notation:

Passed at a general meeting of this Association held at Toronto, this 2nd day of September, 1981.

Where original signatures appear on the document dealt with at the meeting, the names of those signatories appear on the second document in typewritten form in quotation marks, as though this second document were a trued-up copy of a document which bore original signatures. This second document contains provisions respecting annual dues and initiation fees which differ from similar provisions in the document actually discussed on September 2nd. Ms. Paszkowski testified that this second document was not discussed on September 2, 1981, and that there is no copy of it which bears original signatures. Her evidence was that this document was prepared about a week after the meeting of September 2, 1981, on the instructions of Mr. Morrow, who told her that the changed provisions had been approved in a telephone conference call of which Ms. Paszkowski had no direct knowledge.

44. On the view we take, nothing in this case turns on whether the SCEA constitution was amended at some time after September 2, 1981, in the manner Mr. Morrow represented to Ms. Paszkowski, so as to reflect thereafter the contents of the document in question. However, we want to make it clear it did not escape our notice that the document purports to be a true copy of a constitution adopted at a meeting of September 2, 1981 and signed by the persons whose names appear at its foot, and that no such constitution was passed that day and no such signatures were ever placed on any such document. We comment on this again later in our decision.

45. The agreement between CURRE and the SCEA could not be a collective agreement unless the SCEA were an "employers' organization" within the meaning of clause 1(1)(j) of the *Labour Relations Act*, which provides:

"employers' organization" means an organization of employers formed for purposes that include the regulation of relations between employers and employees and includes an accredited employers's organization and a designated or accredited employer bargaining agency;

46. The Board has recognized that the steps necessary to bring into existence something



which may be described as an “organization of employers” are similar to those which are to be taken to bring into existence an organization of employees under section 1(1)(p) of the Act: *Terrazzo Tile & Marble Guild of Ontario*, [1973] OLRB Rep. March 150; *Uptown Motor Hotel Limited*, [1979] OLRB Rep. June 586 at paragraph 11. Counsel for the applicant argued that the steps taken at the meeting of September 2, 1981, were defective in that after taking the steps they did, the participants failed to conduct a vote approving their membership in the organization in accordance with Article 3.01 of the Constitution they had adopted. Article 3.01 reads:

ARTICLE 3 - MEMBERSHIP

3.01 Membership is open to any person, group or company carrying on business as Swiss Chalet Bar B.Q., by virtue of ownership, management contract, franchise or license, with the owner of a trademark (Foodcorp Limited) upon being approved for membership by two-thirds of the then eligible voting members.

Counsel for Foodcorp argued that such a vote was not required. We agree. If the persons present were “eligible voting members”, it would seem unnecessary to conduct a vote for the purpose of approving them for membership, and if they could not be described as “eligible voting members”, then any vote they conducted could have no effect under Article 3. The Board has recognized that there is no one special procedure which must be followed in bringing an unincorporated association into existence, so long as the result of the procedure adopted is that two or more persons have bound themselves together through contractual ties reflected in a constitution which they have all agreed will control their relationship with one another: see *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889. We agree with counsel for Foodcorp that the endorsement at the foot of the constitution was effective to make the seven signatories thereto members of the organization. That endorsement, which is reproduced at paragraph 43 above, amounted to a contract by which all those signing agreed that they and each of the others would be members of the organization and that their relationship would be governed by the provisions of the constitution. We note that the use of that endorsement is entirely analogous to the procedure approved by the Board in *Niagara Veteran Taxi*, *supra*. Accordingly, the SCEA was an “organization”. Having regard to the provisions of its constitution, it was an organization “formed for purposes that include the regulations of relations between employers and employees.” The evidence that Foodcorp and the other six signatories to the constitution were “employers” at the time the organization was formed stands uncontradicted. It is for those reasons that we made the findings set out in paragraph 9 of our decision of September 12, 1984:

9. The Board finds that the Swiss Chalet Employers Association (“SCEA”) is an “employer organization” as defined by clause (1)(1)(j) of the Act. Foodcorp Limited, Bruno Bini, Rahim Foods Limited, 485376 Ontario Limited, Diniz Do Couto, Charles Cianchino and Neil Surujnarain became members of the SCEA at its founding meeting September 2, 1981, and will be referred to hereafter as “founding members”. They were the only members of the SCEA when the SCEA entered into its agreement with CURRE on October 19, 1981.

47. In the period August to October, 1979, Swiss Chalet restaurants were operating at sixteen of the twenty-four locations which are the subject of applications dealt with in our decision of September 12, 1984. One of those sixteen locations was the Scarborough location which had been organized by what is now HERE Local 75 in October of 1979. The other fifteen locations had all been the subject of certifications in which CURRE had been granted the right to represent employees of Foodcorp at those locations. Foodcorp was operating Swiss

Chalet restaurants at only ten of those fifteen locations; the other five had by that time been "franchised". At some time in August, 1981, Foodcorp and CURRE applied jointly, under what is now subsection 52(3) of the *Labour Relations Act*, for the Board's consent to the early termination of the individual location - specific collective agreements to which they were bound with respect to twenty-one Swiss Chalet restaurant locations, including nine of the aforesaid ten locations which were being operated by Foodcorp at that time and which were the subject of certification applications dealt with in our decision of September 12, 1984. The other one of those ten locations was the subject of a similar application filed at some time in September, 1981. Those applications were unopposed, and they were granted by the Board on September 8, and October 19, 1981 respectively.

48. One of the resolutions passed at the founding meeting of the SCEA authorized the association to apply on its members' behalf for early termination of the collective agreements to which they were party. As we have noted, five of the locations which are the subject of applications before us had been "franchised" by that time. The franchisee at two of those locations was Famz Foods Limited, which did not become a member of the association at its organizing meeting. An application was made in late September which purported to deal with five locations, including the three aforesaid locations then franchised otherwise than to Famz. However, the application was made jointly by Foodcorp Limited as "Employer" and CURRE as "Trade Union". As we have noted in our earlier decisions, the franchisees then employing persons in the operation of a Swiss Chalet restaurant at those locations did not join in any application for the early termination of the collective agreement by which they had earlier become bound as a result of the operation of what is now section 63 of the *Labour Relations Act*.

49. On October 19, 1981, CURRE and the SCEA entered into a collective agreement with effect from November 9, 1981 to November 8, 1984. Article 2 of that Agreement provided:

#### ARTICLE 2 - RECOGNITION

2.01 The Association recognizes the Union as the sole collective bargaining agent for all its waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed at its Swiss Chalet Bar B.Q. restaurants in Ontario, save and except assistant hostesses and persons above the rank of assistant hostess, and persons covered by a subsisting Collective Agreement with another Trade Union or other Trade Unions.

2.03 The "Association" as used in this Agreement shall mean those employers, collectively and individually entitled to carry on business under the name and style of Swiss Chalet Bar B.Q. in the Province of Ontario, and who were members in good standing of the Employers' Association at the time of the signing of this Agreement or who may become members of the Employers' Association during the lifetime of this Agreement.

The *Labour Relations Act* defines "collective agreement" in clause 1(1)(e):

"collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement;

As we have noted, the SCEA had seven members as of October 19, 1981. In our decision of September 12, 1984, we questioned whether certain of those members could have become

bound by the SCEA agreement, on the facts as they had been presented to us. In our decision of February 18, 1985, we found that they could not. Nevertheless, there could and can be no doubt that Foodcorp Limited was a member of the SCEA, that Foodcorp Limited was free to enter into a collective agreement with CURRE and that CURRE was a trade union entitled to represent employees of Foodcorp. Having found that CURRE was a trade union and that the SCEA was an employers' organization, it followed that the statutory definition of "collective agreement" could be applied to the SCEA agreement, whether or not any other founding member of the SCEA became bound to that agreement as a result of its execution by the Association in October, 1981. It was for the foregoing reasons we made the finding set out in paragraph 13 of our decision of September 13, 1984:

13. Subject to the effect, if any, of a determination of the Intertec issue, the Board is satisfied that the SCEA agreement is a collective agreement as defined by clause 1(1)(e) of the Act.

50. Foodcorp was respondent in only six of the twenty-four applications affected by our decision of September 12, 1984. Four of those applications were with respect to locations at which Foodcorp had been operating a Swiss Chalet restaurant at the time of the formation of the Swiss Chalet Employers' Association, and the two others were locations which Foodcorp had opened thereafter and was still operating at the time the applicant made its application with respect to that location. The respondents in the other eighteen locations were "franchisees" of Foodcorp. Each of those franchisees claimed to be bound by the agreement between the SCEA and CURRE. In our decision of September 12, 1984, we found that some of the franchisees were, and others were not, bound by that agreement at the time the relevant application was filed. We turn now to the evidence, argument and reasoning which lead to those conclusions.

51. Ms. Paszkowski testified that it was and had been part of her job function to receive applications for membership in the SCEA. She had searched the records of the SCEA to ascertain whether it had on file applications for membership from any of the franchisee respondents in these applications. She produced twelve documents which she said she had found in the files of the SCEA. All but one of them was in the form provided for in the purportedly amended SCEA constitution:

SWISS CHALET EMPLOYERS' ASSOCIATION

APPLICATION FOR MEMBERSHIP

NAME -----

ADDRESS -----

DATE ----- TELEPHONE NO. -----We hereby request and accept membership in the SWISS CHALET EMPLOYERS' ASSOCIATION. We hereby acknowledge receipt of a copy of the Constitution of the Association and approve its contents. We further acknowledge and state that we are bound by all its terms and provisions. We agree to be bound by the terms of the Collective Agreement between the SWISS CHALET EMPLOYERS' ASSOCIATION and the Canadian Union of Restaurant and Related Employees.

WITNESS:



One of the applications, that of Jose Paiva dated December 8, 1982, is in the form provided for in the constitution actually adopted at the founding meeting of the SCEA. That form differs from the one quoted in that it does not include the last sentence referring to the agreement between the SCEA and CURRE. Applicants named on these twelve applications were: Cabral Foods Inc., Jose Paiva, Manuel Goncalves, Restaurateur, Ltd., L.M.L. Foods Inc., L. DeSousa Enterprises Ltd., F.G. Andriuolo Foods Inc., Dinnerex Inc., Famz Foods Limited, Carlos Calisto, William Odorico Investments Ltd., G.H. Sousa Holdings Inc., and D.N.M. Lau Food Inc.

52. Counsel for the applicant objected to the introduction of these documents into evidence. He argued that they constituted hearsay evidence of matters on which the best evidence could have been obtained in testimony from representatives of the various applicants. In overruling the objection, we noted Ms. Paszkowski's evidence that these were documents maintained by the Association in the ordinary course of its activities under the witness's custody as part of her ordinary job duties. We ruled that we would accept the documents into evidence, leaving the question of the weight to be assigned to them to be determined later. At a later point in her testimony, Ms. Paszkowski tendered an original application for membership by 555618 Ontario Ltd. dated June 12, 1983. Ms. Paszkowski explained that she had been unable to find an application by that company when she reviewed the records of the SCEA, and had contacted that company to ask its principal whether he recalled ever having signed an application. He told her he thought he had, and on that basis she had instructed one of her clerical staff to send that company a new application for execution. All this had taken place in the week or two prior to the hearing at which the document was tendered. Ms. Paszkowski was not sure who had dated the application June 12, 1983. There was no attempt to mislead the Board as to the time when the misdated application had actually been executed, and we are unable to tell from the evidence whether the misdating was intentional or inadvertent. Of course, the misdated document was not acceptable evidence that the signatory was a member of the SCEA on June 12, 1983. The significance to us of its having been tendered in this misdated form was that it suggested the document handling techniques of Foodcorp and the SCEA were less than meticulous and, hence, that documents purportedly produced and maintained in the ordinary course of their business might be less than totally reliable evidence of the truth of their contents. The earlier tender of a purportedly true copy of a non-existent original document lent weight to that concern. As it happens, the accuracy of the dates and other contents of the other twelve applications was not critical to our decision. What was critical to our decision was Ms. Paszkowski's uncontroverted testimony that none of these applications for membership had ever been "approved for membership by two-thirds of the then eligible voting members" pursuant to Article 3.01 of the SCEA constitution.

53. Only three of the respondents were members of the SCEA when it entered into its agreement of October 19, 1981 with CURRE. Those were: Foodcorp Limited, 485376 Ontario Limited, and Rahims Foods Limited. Famz Foods Limited was operating Swiss Chalet restaurants at that time, but was not then a member of the SCEA. The other twelve franchisee respondents began to operate Swiss Chalet restaurants after October 19, 1981. In most cases, those were restaurants which had been operated by Foodcorp Limited prior to the location being "franchised" to the respondent employer. In some cases, however, the respondent's operation was the first Swiss Chalet restaurant operation at that location. CURRE's witnesses testified in generalities that they had considered all such Swiss Chalet employers to be bound by the SCEA agreement, and that all such employers had behaved as though they were bound.

Details of such behaviour were not assigned with particularity to individual named respondents. While CURRE had signed the SCEA agreement, there was no evidence that it had ever signed any subsequent document acknowledging that it and any of the respondents were bound by the terms of that agreement. There was no evidence that CURRE had been made aware of applications for membership in the SCEA or of the undertakings contained therein with respect to the SCEA application, and there was no evidence that CURRE had ever given any written acknowledgment or acceptance of any such undertaking.

54. Counsel for the respondents and interveners argued that respondents other than original members of the SCEA had become bound by the SCEA agreement after its effective date by one or more of several methods. With respect to each such respondent, they argued, firstly, that the moment an employer became a member of the SCEA, that employer and its employees became covered by the SCEA agreement by operation of that agreement's recognition provisions and without the necessity of execution of any additional document by anyone. They argued, secondly, that the employers who signed and sent to the SCEA an application for membership in the form quoted in paragraph 57 above thereby became bound by the provisions of the SCEA agreement by reason of the undertaking contained in the last sentence of that application. Finally, the respondents argued that an employer to whom an operating Swiss Chalet restaurant was franchised by Foodcorp after October 16, 1981, became bound by the terms of the SCEA agreement by operation of section 63 of the *Labour Relations Act*.

55. The respondents' first argument floundered on a factual problem. They had not established that any respondents other than original members had become members of the SCEA. The evidence established that Article 3.01 of the SCEA's constitution had been in full force and effect at all material times. There was no evidence that any of the persons who applied for membership in the SCEA after its formation had ever been approved for membership in the manner contemplated by article 3.01 of the SCEA constitution. We have it on highest authority that when the question with which we are faced is whether or not a person is a "member" of an organization, it is not proper for us to answer in the affirmative on the basis only of evidence that the person had applied for membership, that the person had indicated acceptance of membership and assumption of membership responsibilities by paying at least \$1.00 on account of the prescribed membership fees or dues, that the constitution of the organization did not contain an express prohibition of the person being admitted to membership and that the organization accorded the person full rights and privileges as a member: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796, et al*, [1970] S.C.R. 425, 11 D.L.R. (3d) 336; 70 CLLC 14,008 (S.C.C.). Accordingly, even if the words "or who may become members of the Employers Association during the lifetime of the Agreement" in Article 2.03 of the SCEA agreement could bind to that Agreement persons who became members after it came into effect, none of the respondents fell within the reach of those words.

56. There were other difficulties with the respondents' first argument.

57. The *Labour Relations Act* requires that a collective agreement be an agreement in writing, and that has always been understood to mean an agreement in writing executed or signed by or on behalf of the parties to the agreement: see *Williams Contracting Ltd.*, [1980] OLRB Rep. July 1115 and the cases cited therein at paragraph 20. The agreement may consist of more than one document, and the signatures of the parties may be found in more than one



document, provided that the documents together unambiguously evidence the agreement of the signatories to the terms set out therein. It is well established both that merely joining an employer's organization is not enough to bind an employer to the terms of any existing collective agreement between the employers' association and a trade union, and that conducting its employee relations in accordance with the terms of that collective agreement is equally insufficient to bind the new member, or any other employer, to the terms of the existing agreement: *Foundation Company of Canada*, 57 CLLC 18,078 *Hacquoil Construction Limited*, [1963] OLRB Rep. June 143; *Sovereign Construction Company Ltd.*, 60 CLLC 16,168. It is not even enough for the employer or the association to write to the trade union saying that the employer will be bound: *Jimmy's II*, [1977] OLRB Rep. Sept. 572; *Hacquoil Construction Ltd.*, *supra*. A unilateral act is not enough - the written agreement must be brought into existence by both the employer and the union who are to be bound.

58. Subsection 52(4) of the Act contemplates circumstances in which a new employer association member may be bound to the association's existing agreement with a trade union which represents the new member's employees:

52.(4) Notwithstanding anything in this section, where an employer joins an employers' organization that is a party to a collective agreement with a trade union or council of trade unions and he agrees with the trade union or council of trade unions to be bound by the collective agreement between the trade union or council of trade unions and the employers' organization, the agreement ceases to be binding upon the employer and the trade union or council of trade unions at the same time as the agreement between the employers' organization and the trade union or council of trade unions ceases to be binding.

The Board commented on this subsection in *Williams Contracting Limited*, *supra*, at paragraph 26:

The *Labour Relations Act*, section 44(4) [now 52(4)] makes it clear that where an employer joins an employers' organization that is a party to a collective agreement, the employer must agree with the trade union that the agreement is to bind the employer and where this mutual agreement is forthcoming the extent of the obligation parallels the duration of the pre-existing collective agreement. While it is unnecessary to this case, it is also our view that consent under section 44(4) must be in writing and signed by both parties. These requirements arise from the definition of a collective agreement in section 1(1)(e) of the Act in that an agreement to be bound by a pre-existing collective agreement under section 44(4) is itself a constituent element of the collective agreement then entered into between the parties. It is our opinion that an agreement to be bound under section 44(4) is no different in practical effect than a memorandum of agreement to be bound by terms similar to a pre-existing collective agreement where the memorandum of agreement represents an adoption or incorporation by reference of all the terms of the pre-existing collective agreement. If a signed memorandum of agreement was unnecessary in such circumstances, it would then be possible to create a collective bargaining agreement by an oral exchange of promises and it is the unreliability of just such exchanges that section 1(1)(e) is designed to avoid.

59. The document or documents which comprise a collective agreement may be signed by agents on behalf of the parties. Indeed, section 51 of the *Labour Relations Act* has the effect of constituting an employer's association as agent with ostensible authority to bargain on behalf of all its *then* members, even those who have not given it actual authority to do so, when those employers and the employers' association fail to alert the trade union with which the employers' association is bargaining to the limits of the actual authority of the employers' association: *Paul D'Aoust Construction Limited*, [1976] OLRB Rep. Sept. 529. It is important to note, however, that section 51 of the Act is not effective to confer upon a



trade union the right to represent employees for whom it held no prior bargaining rights: *Sovereign Construction Co. Ltd.*, 60 CLLC 16,168, and *Paul D'Aoust Construction Limited*, *supra*, at paragraph 42.

60. Underlying all of the provisions of the *Labour Relations Act* is the concept that employees determine which trade union, if any, will bargain with their employer concerning their wages and working conditions. It is only once a bargaining unit of employees of an employer has selected a trade union as their bargaining agent that the trade union and employer can properly negotiate a collective agreement. The parties to established bargaining relationships are free to amend, alter, extend or abridge the bargaining rights contained in a Board certificate or in the recognition clause of a voluntary recognition agreement or existing collective agreement: *Gilbarco*, [1971] OLRB Rep. March 155. The bargaining unit definition adopted by the parties to such a relationship can be so framed that its words may later sweep unorganized employees of the employer into its net: *Kohen Box Co. (Windsor) Limited*, [1966] OLRB Rep. May 117; and see *Re Canadian Appliance Manufacturing Company Ltd.*, (1979) 20 L.A.C. (2d) 59 (Shime). However, the employer and trade union parties to an established bargaining relationship cannot so define their bargaining unit as to effectively bind another employer for whom the party employer is not acting as agent and this is so, in the absence of a declaration under section 1(4) of the Act, even if the employer whom the parties seek to bind is a wholly owned subsidiary of the party employer: *Harding Brantford Limited*, [1966] OLRB Rep. July 245.

61. The respondents and interveners fell back on principles of the law of agency which they submitted would support their contention that the execution of the SCEA agreement by CURRE and the association on October 18, 1981, was a sufficient compliance with the requirement that agreements be in writing and signed by the parties so as to bind respondent employers other than the original members of SCEA as those respondents came on the scene during the term of the SCEA agreement. While counsel did not argue that SCEA had actual or ostensible authority on October 19, 1981, to bind future unnamed members of its association, counsel for Foodcorp argued that the subsequent behaviour of those members as they appeared on the scene could and did amount to a ratification of the SCEA's original execution of the collective agreement on their behalf. He cited *Sentinel Reliance Products Limited*, [1973] OLRB Rep. Jan. 7 for the proposition that a party may become bound to a collective agreement by ratifying the act of a person who purported to execute the agreement as an agent.

62. The doctrine of ratification could not be applied to the facts of the situation before us, even assuming that the employers sought to be bound by the application of that doctrine had become members of the SCEA at the time of the purported ratification. The *Sentinel Reliance* case, and other ratification cases like *G. M. Gest Limited*, [1978] OLRB Rep. Aug. 747 and *Hussey Seating Company (Canada) Limited*, [1981] OLRB Rep. Aug. 1138 are all cases in which an agent without actual or ostensible authority purported to execute a collective agreement on behalf of a named, existing entity which could properly have entered into that agreement and, indeed, was under a duty to bargain at the time the agreement was made. The Board found that the entity in whose name the agent had acted had, by its later conduct, ratified that early unauthorized act. In order to constitute an agency by ratification, it is essential that the actions to be ratified have been taken by the agent purportedly on behalf of a named or ascertainable principal: *Eastern Construction Co. v. National Trust Co.*, (1913) 15 D.L.R. 755 (P.C.) at 766. There is no evidence that any of the respondents who are said

to have ratified the SCEA's contracting on their behalf was named or ascertainable at the time the SCEA agreement was signed. Indeed, there is no evidence that any of those employers was in existence at that time, and it is trite law that the purported act of an agent on behalf of a non-existent principal cannot be ratified when that principal later comes into existence, except in the narrow circumstances (inapplicable here) contemplated by statutes providing for incorporation.

63. Counsel for the interveners acknowledged the many Board decisions which hold that in order for an employer to become bound by the terms of an existing collective agreement between a trade union and an employer association, the *Labour Relations Act* and first principles of contract law require that the new employer and the trade union agree upon that arrangement and evidence that agreement in a document or documents signed by both of them. Counsel claimed, however, that the necessary documents and agreement could be found with respect to each new employer in the particular documentation and approach adopted by CURRE and the SCEA. He argued that by the particular language of Article 2.03 of the collective agreement, CURRE has agreed in advance to be bound with respect to new members. When they signed their membership application, new members evidenced their agreement to be bound. The evident absence in this arrangement of a concurrent contractual meeting of minds was remedied, according to the interveners' theory, by treating the SCEA agreement as having constituted the SCEA as agent for CURRE to effect contracts between CURRE and new association members. In support of the proposition that such an arrangement is legally tenable, counsel cited *McCannell v. Mabee-McLaren Motors Ltd.*, [1926] 1 D.L.R. 282 (B.C.C.A.). In that case the plaintiff was a Studebaker automobile dealer. Studebaker had assigned each of its dealers a particular territory. Its standard contract with each dealer required that the dealer not solicit outside its territory and that a portion of the profit on unsolicited sales to persons residing in another dealer's territory be paid over to that other dealer. This "infringement of territory" provision concluded with these words: "It is understood and agreed that this paragraph shall be construed as an agreement between the dealer and all other Studebaker dealers who have signed a similar agreement and that nothing herein contained shall be construed as a liability on the part of Company to dealer for territorial infringement by any other dealer". The plaintiff and defendant in the *McCannell* case were both parties to separate agreements of this sort with Studebaker. It appears from the report of the case that the object of the plaintiff's claim was to enforce the defendant's obligation to account for extra-territorial sales. The defendants resisted the suit on the sole ground that there was no privity of contract between them and the plaintiff. The court concluded that Studebaker had to be regarded as having been the agent of each of the dealers to bring about the privity of contract which the contractual provision expressly contemplated would be created. The Court noted that the intention of the parties was clear, that the reasonableness of the provision was beyond doubt, and that there was in these circumstances nothing novel in regarding the company as agent for each of its dealers in effecting the contemplated agreement between them.

64. The express language of the provision considered in the *McCannell* case is obviously quite different from the language of Article 2.03 of the SCEA agreement. The commercial context is also quite different. The court in *McCannell* obviously considered the desired result commercially worthy and the means of achieving it legally sensible. Here the language of Article 2.03 does not purport to create a contractual relationship separate and apart from the contract in which it appears, and if it did that result would not be sensible or worthy in a labour relations context. Article 2.03 does not expressly appoint the SCEA as CURRE'S agent for effecting future collective agreements into which the terms of the present one might be



incorporated by reference. Indeed, an arrangement of that sort would be entirely repugnant to the scheme of the *Labour Relations Act*. To understand that clearly, it is important to note that it was and is not a condition of acceptance into membership in the SCEA that the applicant employ persons for whom CURRE has existing bargaining rights. The interpretation proposed by the interveners would make the SCEA the middle man in arrangements by which CURRE and an employer enter into a collective bargaining relationship without any regard to the wishes of the employees affected. As the Board noted in *Sunrise Paving & Construction Co. Ltd.*, [1972] OLRB Rep. March 199, such an arrangement would constitute “other support” to a trade union within the meaning of what is now section 48 of the *Labour Relations Act*, and would deprive the resulting agreement of status as a “collective agreement” within the meaning of that Act. The disability which results from such an approach is not cured by the passage of time. As the Board noted in *C. Strauss (1973) Limited*, [1975] OLRB Rep. July 581, the provisions of what are now sections 48 and 60 deal with different issues, and while a question of quantum of support existing at the time of a voluntary recognition may become moot at the end of a year, the prior acceptance of employer support does not. In *Nicholls-Radtke & Associates Limited*, [1982] OLRB Rep. July 1028, the Board noted that an employer’s execution of a collective agreement at a time when it has no employees at work may not amount to employer support in the construction industry, where the employer party intends to obtain the employees who would be covered by the collective agreement through the union’s hiring hall in accordance with the terms of that agreement. In that case, however, the Board noted that the situation would be quite different if it was not contemplated that the union would be supplying the employees required by the employer, and that employer support would be manifest where the agreement signed by the employer required that new employees recruited by that employer take out membership in the trade union as a condition of continued employment. CURRE did not operate a hiring hall or otherwise undertake to supply employees. Its agreement with the SCEA did provide that each party employer must require new employees to become CURRE members. The point of this analysis is not to determine whether that sort of employer support actually occurred in this case, but only to demonstrate that the “mutual agency” interpretation which counsel advocated for Article 2.03 of the SCEA collective agreement was fraught with the danger of breach of the *Labour Relations Act* and impairment *ab initio* of the very rights sought to be advanced by that interpretation. Indeed, quite apart from the possibility of SCEA’s effecting what amounts to unfair labour practice voluntary recognition in this role as mutual agent, the mere suggestion that CURRE had sought and obtained the agreement of an employer’s organization to act as its agent in advancing its bargaining rights might well provide the basis for an argument that an employer’s organization was participating in the administration of and contributing support to CURRE, thereby attracting adverse consequences for CURRE under sections 13 and 48 and for the SCEA and its members under section 64. Again, we are not suggesting that such consequences have been attracted in this case, but only that the mutual agency interpretation of Article 2.03 is not, in the labour relations context of this case, a commercially reasonable one. Accordingly, we did not interpret Article 2.03 as constituting the SCEA as an agent for CURRE for the purpose of effecting collective agreements on its behalf with employers who were not members of the SCEA at the time Article 2.03 was agreed to.

65. In summary, even if any of the respondents was an employer who had become a member of the Association during the lifetime of the Association’s agreement, the reference to such employers in Article 2.03 would not make them a party to that or any other collective agreement within the meaning of the *Labour Relations Act*. The written undertaking of the new member to be bound by the terms of the existing agreement would, by itself, be equally



ineffective, whether addressed to the SCEA in a membership application or to CURRE in a letter. An employer not party to the SCEA agreement when it was executed could not become a party to it thereafter by taking out membership or by any other means. It could only become party to a collective agreement which incorporated by reference the terms of the SCEA agreement, and it could only become bound by such an agreement if the agreement was evidenced by a writing or writings signed by both CURRE and the employer to be bound. No such agreement was established with respect to any of the respondents who were not members of the SCEA at the time the agreement came into effect. Thus the first and second arguments failed and, for these reasons we came to the conclusions set out in paragraphs 10, 11 and 12 of our decision of September 12, 1984:

10. The Board finds that the following respondents applied for membership in the SCEA after October 19, 1981: Cabral Foods Inc., Manuel Goncalves, Restaurateur Ltd., LML Foods Inc., L. DeSousa Enterprises Ltd., F. G. Andriuolo Foods Inc., Dinnerex Inc., Famz Foods Limited, William Odorico Investments Ltd., G. H. Sousa Holdings Inc. and D.N.M. Lau Foods Inc. There is no acceptable evidence that any other respondent applied for membership in the SCEA prior to the date the applicant applied for certification with respect to that respondent's employees. In any event, there is no evidence that any of the respondents who applied for SCEA membership after September 2, 1981 actually became a member of SCEA, since there is no evidence that any applicant received the approval of two-thirds of existing members, as required by the SCEA constitution.

11. The respondents who applied for SCEA membership after September 2, 1981 all signed a form of application which included this provision:

We agree to be bound by the terms of the Collective Agreement between the SWISS CHALET EMPLOYERS' ASSOCIATION and the Canadian Union of Restaurant and Related Employees.

There is no evidence that CURRE signed any document consenting to be bound to the terms of the agreement with respect to employees of any of the respondents who are not founding members. We find that the execution of such applications was ineffective to bind an applicant to the SCEA agreement if it was not otherwise bound.

12. The Board finds that the language of Article 2.03 of the SCEA agreement was not effective, at least on the facts of this case, to bind to that agreement's terms any respondent employer other than a founding member. As we will note later, we are in some doubt whether certain founding members became or are bound.

66. The respondents' and interveners' third argument was that respondent employers whose operations were located at sites previously occupied by Foodcorp Limited were successors to Foodcorp Limited within the meaning of section 63 of the *Labour Relations Act*. Counsel for the respondents other than Foodcorp argued that no evidence had been led to show that there had *not* been a sale of business from Foodcorp to the subsequent employer occupant of locations originally operated by Foodcorp, and that the applicant had provided no particulars to the contrary. He submitted that the effect of section 63 was "automatic", and that employers at locations originally opened by Foodcorp must therefore be bound by CURRE bargaining rights and collective agreements, as a matter of law. Counsel went so far as to argue that the Board needs no evidence that a sale of business has occurred if the parties to the alleged sale agree, as they did here, that there has been one. Counsel for Foodcorp, although not directly affected by this issue, noted that the Board did have before it evidence that would support a finding of sale of business in each of the locations in question. In each case, the basic evidence was that Foodcorp had operated a restaurant at a particular location, then engaged in a "franchise" transaction with another entity, following which the second entity operated a

restaurant at the location previously occupied by Foodcorp. Counsel for Foodcorp argued that on the present state of the Board's jurisprudence, this was enough on which to base a finding that a sale of business had occurred. Counsel referred to the Board's decision in *Metropolitan Parking*, [1979] OLRB Rep. December 1193 as establishing that the circumstances of that case were the only circumstances in which the consecutive operation by the alleged predecessor and successor of similar businesses at the same location would not be found to be a sale of business.

67. Counsel for the applicant argued that the Board does require evidence to support a finding of sale of business. He said the onus of proof lies on the party asserting that a sale of business has occurred, citing *Super City Discount*, [1964] OLRB Rep. May 93, *Super City Discount*, [1969] OLRB Rep. Aug. 666, *Woodway Structural Components*, [1971] OLRB Rep. Aug. 545, and *Beaver Engineering Limited*, [1973] OLRB Rep. Jan. 57. Counsel conceded that the summary given by Ms. Paszkowski in evidence must be taken as evidence of its contents, but correctly pointed out that summary only tells us that there was some transaction between Foodcorp and the alleged successor which Foodcorp describes as a "franchise". Counsel argued that a "franchise" is not necessarily a sale of business, and that we cannot conclude that these franchises were sales of businesses without knowing more than we do about the franchise agreements.

68. The respondents all asserted that they were bound to an outstanding collective agreement which operates as a bar to the certification application which affects them. The onus was on each respondent to establish the facts necessary to support that allegation. If a respondent claims to be bound to a collective agreement as a result of a sale of business to them by another party who is clearly bound, then the onus is on that respondent to establish the facts necessary to support that conclusion. Section 63 does impose bargaining rights in collective agreements by operation of law, but only in certain factual circumstances. Those circumstances must be proved before the operation of section 63 can be relied upon to establish a collective agreement bar. The parties to the collective bargaining relationships allegedly established by sales of business were in like interest in these proceedings; they all stood opposed to the applicant on the question of timeliness of the applicant's certification application. It is not enough in these circumstances for the interested parties to merely allege that they engaged in a sale of business. The Board will not dismiss a certification application merely because the respondent asserts a belief that it is a successor employer, without proving that fact: *Darrigo's Supermarkets Limited*, [1975] OLRB Rep. Feb. 93 at paragraph 18. Unlike the situation in the *Darrigo's* case, however, there was some evidence before us with respect to the alleged sales of businesses. There was evidence that Foodcorp carried on a restaurant business under the name "Swiss Chalet" at various locations. With respect to a number of those locations, there was evidence that Foodcorp engaged in a transaction of some kind with another party, after which the other party carried on a restaurant business at the location which was the subject matter of the "franchise" transaction. Those facts are consistent with the transaction being a "sale of business" as that phrase is understood. We quite agreed with counsel for the applicant that there was much additional evidence the respondents could easily have led with respect to these transactions. The question is whether the failure to lead that evidence carried with it some adverse consequence.

69. Prior to the introduction of subsection 13 of section 63, the Board had to struggle with the location of the onus of proof and the burden of adducing evidence in applications under that section. The Board concluded that the legal onus was on the party asserting that

a sale of business had occurred. That party was usually a trade union without any direct knowledge of the facts relevant to the legal issue raised. The Board concluded that although a trade union would have to lead evidence to support its contention, it might not take much evidence to shift the burden of adducing evidence to those who denied that a sale of business had occurred: *Beaver Engineering Limited*, *supra*, and *Woodway Structural Components*, *supra*, at paragraph 8. In the state of the law at that time, when respondents with knowledge of the relevant facts failed to adduce evidence, the Board was prepared to draw an inference that such evidence would be unfavourable to their position.

70. Subsection 13 of section 63 was intended to eliminate the difficulties with which the Board had to struggle in those earlier cases. While the legal onus remains unchanged by subsection 13, the evidentiary obligation imposed by that subsection makes the location of the legal onus academic except in rare circumstances where the probabilities are evenly balanced at the conclusion of the evidence: see *Marvel Jewellery Ltd.*, [1975] OLRB Rep. Sept. 733. The imposition of this evidentiary obligation was designed to ensure that no one was left arguing about the inferences to be drawn from failure to lead evidence by a party to a transaction alleged to be a sale of business. Where it is suggested that an employer has failed to call evidence which would have been unfavourable to its position on the sale of business issue, the party taking that position may now apply to the Board for an order directing compliance with the obligations imposed by subsection 13: *Canada Cement Lafarge Ltd.*, [1977] OLRB Rep. Jan. 5; see also *Richmond Insulation*, [1980] OLRB Rep. Oct. 1519; and, *Guaranteed Insulation '77 Limited*, [1981] OLRB Rep. Oct. 1394. Counsel for the applicant did not ask the Board to direct that any of the respondents give evidence with respect to any of the transaction alleged to constitute a sale of business. During argument, counsel for the franchisee respondents indicated a willingness to file the franchise agreements if the Board was in any doubt about the character of those transactions, and applied for leave to reopen his case in order to do so. That application was opposed by counsel for the applicant, who took the position that the respondents had a full opportunity to lead any evidence they wished on these issues, and could not claim to be taken by surprise at his assertion that the respondents allegation of untimeliness had to be strictly proved. We agreed with counsel for the applicant, and denied the application to reopen the respondents' case. However, the applicant mounted no attack on the proposition that any of these transactions constituted a sale of business, he merely insisted that there be "strict proof". In all these circumstances, we did not consider it would be appropriate to draw any adverse inference from the respondents' undoubted failure to lead evidence with respect to these alleged sales of business. That left us with the simple question whether the evidence before us was sufficient, in these circumstances, to support a finding that there had been a sale of business. We were satisfied that it was, and for these reasons made the ruling set out in paragraph 14 of our decision of September 12, 1984:

14. A number of respondents operate a restaurant at a location at which Foodcorp Limited previously operated a restaurant. In each such case, it is said that the location was "franchised" by Foodcorp to the subsequent operator by means of some transaction between them. Although there is very little evidence of the precise nature of these franchise transactions, the facts and circumstances in these cases warrant a finding in each such case that the "franchising" of the location constituted a "sale of business" within which the meaning of section 63 of the Act. The effect of this finding depends on the time when the sale occurred. If it occurred after October 19, 1981, then the successor employer will have become bound by the terms of the SCEA agreement when the franchise transaction was completed. If the franchise transaction was completed prior to October 14, 1981, the successor will have been bound, at least initially, to the collective agreement between Foodcorp and CURRE with respect to that location, unless that agreement had effectively been terminated by the time the location was franchised to the successor.



71. We have set out in this decision our reasons for the general conclusions expressed in paragraphs 7 to 14 of our decision of September 12, 1984. The application of those conclusions to each of the 24 applications then before us was dealt with in that decision, and need not be reviewed again here.

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**0556-85-M Metro Windsor-Essex County Health Unit, Applicant, v. The Canadian Union of Public Employees, Respondent**

**Employee Reference - Practice and Procedure - Dispute whether person occupying newly created position excluded as managerial/confidential - Board referring to parallel procedures of s.106(2) and arbitration available to parties - Board finding of employee status not determining whether person covered by particular collective agreement - Board not deferring to arbitration**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *F. W. Murray* and *B. L. Armstrong*.

**DECISION OF THE BOARD;** August 2, 1985

1. The applicant employer has requested the Board to determine, pursuant to the provisions of section 106(2) of the *Labour Relations Act*, whether the person in the new position of "Dental Assistant Supervisor" is an "employee" for the purposes of the Act.

2. The respondent trade union has submitted the issue of the new position's exclusion from the application of the collective agreement to arbitration, and asks that the Board defer to arbitration, on the basis that its referral was made first, and that, as the position is newly established, the Board would have difficulty assessing the application of section 1(3)(b) of the Act.

3. There is, as the parties have noted, at least a degree of parallel procedures available to parties with an issue of this type. The extent to which they *are* parallel, however, is not as clear as it might be. In *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500, the Board noted:

"Once a collective agreement has been entered into, a subsequent dispute as to whether or not a particular person is a member of the bargaining unit often involves *two* questions. The first question is whether the person is an 'employee' within the meaning of *The Labour Relations Act*. That is the only question to which the Board addresses itself under section 95(2) [now 106(2)], and usually involves an assessment of whether the person 'exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations', within the meaning of section 1(3)(b) of the Act. It is, unfortunately, not as clear as it might be whether this is a question which, in the context of a collective agreement, can only be brought before the Ontario Labour Relations Board for determination. See *Canadian Industries Ltd.*, (1972) 3 O.R. 63; *Re Miller et al and Algoma Steelworkers Credit Union*, 75 CLLC 14,289; *Re General Concrete*, (1978) 22 O.R. (2d) 65. In any event, if it is determined that the person *is* an 'employee' within the meaning of *The Labour Relations Act*, the second (and ultimate) question is whether the person is covered by the collective agreement itself,

having regard to the language of the 'Scope' clause and any factors relevant to its interpretation. That question may be determined by the parties pursuant to the grievance and arbitration provisions of the collective agreement. It might be further noted, as an incidental matter, that once a collective agreement is entered into, the Board itself (in normal circumstances) considers the effect of its own certificate to have been 'spent', in the sense that it is the language of the collective agreement negotiated by the parties which then governs as to the extent of the bargaining unit currently represented by the trade union. See *Gilbarco Canada Ltd.*, [1971] OLRB Rep. March 155."

And further, in *Northern Telecom*, [1983] OLRB Rep. January 95:

"• • •

The relevant provisions of the *Labour Relations Act* are sections 1(3)(b) and 106(2):

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

(b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

106.-(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

(emphasis added)

The purpose of section 1(3)(b) is to ensure that persons in the bargaining unit are not faced with a conflict as between their interests as members of the bargaining unit, and such obligations to their employer as may arise from the exercise of managerial responsibilities. Collective bargaining, by its very nature, requires an arm's length relationship between the 'two sides' whose objectives are sometimes divergent. This conflict of interest problem is avoided by excluding 'managerial' personnel from the definition of 'employee' and, therefore, from coverage by the Act or participation in collective bargaining. The line is drawn where, *in the opinion of the Ontario Labour Relations Board*, an individual exercises 'managerial functions'. That decision is final and binding for all purposes (see sections 106 and 108).

One of the ways in which an employee status issue can come before the Board is under section 106(2), when a question arises between the parties as to whether an individual is, or is not, an 'employee' *for the purposes of the Act*. It is important to note, however, that the issue before the Board under section 106(2) concerns the application of the statute and the statutory definition of the term 'employee' - not whether an individual is covered by a collective agreement. That is a somewhat different issue.

A collective agreement has no common law foundation. Its legal characteristics are drawn from the Act, and by definition (see section 1(1)(e)), it prescribes the terms and conditions of 'employment' for 'employees' represented by the union which, in turn, is an 'organization of employees'. Moreover, (see section 50) it is only binding upon 'the employees in the bargaining unit' defined in it. In both cases, the term 'employee' must be taken to exclude persons who by virtue of section 1(3)(b) are not 'employees' under the Act. Indeed, given the array of provisions designed to ensure the separation of employer and employees (see sections 1(3)(b), 13, 48, 64 and 106) it would be anomalous if management were in the bargaining unit or covered by the collective agreement. It follows that if an individual exercises managerial functions he is not an 'employee' under the Act, and cannot be considered an 'employee' for

collective bargaining purposes, or to whom the negotiated collective agreement applies. Finally, since employee status under the Act turns on the opinion of the Ontario Labour Relations Board, it is doubtful whether an arbitrator under a collective agreement has any jurisdiction to resolve this issue. It is the opinion of this Board in the exercise of its exclusive jurisdiction which is determinative.

For the foregoing reasons, a Board determination that an individual exercises managerial functions and is not an 'employee' under the Act may well be determinative of his status under a collective agreement. If, in the opinion of the Board, he exercises managerial functions, then he is not an employee, and the agreement cannot apply. On the other hand, if, in the opinion of the Board, he does *not* exercise managerial functions then he is an employee under the Act to whom the agreement *may* apply depending on its terms. But it does not necessarily follow that 'all employees' will be covered by an outstanding collective agreement. That depends upon the bargaining unit description which the parties have negotiated. It is not at all unusual for certain employee categories to be excluded from a collective agreement. These employees are not covered by the agreement even though they are legally eligible for coverage. Likewise, it is not unusual for disputes to arise between the parties about the application of the agreement to individuals who are clearly employees, but who may nevertheless be beyond the scope of the agreement because the contractual language is not broad enough to cover their job classifications. These are questions which must ultimately be resolved by arbitration, since they involve the interpretation of the collective agreement. Of course, if the dispute centres on a term such as 'foreman', 'supervisor', or other word intended by the parties to denote managerial status, then the Board decision will probably resolve the interpretation problem and make a resort to arbitration unnecessary. It is unlikely that the parties intended such terms to include persons who are not really 'managerial' under the Act."

4. It is the desire of the Board to provide guidance to the parties which will enable them to deal with this issue as fully and as expeditiously as possible. Unfortunately, as the above references show, a question exists whether any single proceeding will necessarily be determinative. There may be limits on the jurisdiction of an arbitrator, for example, to finally decide the matter in dispute, in light of the words 'in the opinion of the Board' in section 1(3)(b) of the *Labour Relations Act*. On the other hand, a determination by the Board that a person is an "employee" for the purposes of the Act, and therefore *eligible* for coverage by a collective agreement, will not necessarily answer the question whether that person is covered by the existing scope of a *particular* collective agreement, as the Board often notes in its appointments under section 106(2).

5. Here the issue appears to be essentially a "managerial" one, together, perhaps, with the additional issue of labour-relations confidentiality included under section 1(3)(b). These are matters normally dealt with by the Board. It may be, having regard to the comments of the Board referred to above, that a determination of those issues by the Board will eliminate the need for further proceedings *whichever* way the Board decides the question.

6. The Board accordingly appoints an Officer to inquire into and report to the Board on the duties and responsibilities of the person occupying the newly-established position of Dental Assistant Supervisor. Having regard to the fact that the position *is* newly-established, the parties will simply have to provide the Board with the best evidence available as to what those duties and responsibilities entail. See *Corporation of the City of Barrie*, [1983] OLRB Rep. August 1239.

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**0130-85-M International Union of Operating Engineers, Local 793, Applicant, v. Piggott Construction Limited, Respondent**

**Construction Industry Grievance - Damages - Remedies - Failure to hire affiliated sub-contractor held to be violation of agreement - Union failing to establish that union members or sub-contractors whose employees were union members available to perform work in question - No damages awarded in circumstances**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *J. Wilson* and *N. Wilson*.

**APPEARANCES:** *Jack J. Slaughter*, *Len Budge* and *C. T. Unsworth* for the applicant; *R. A. Werry* and *Joe Keyes* for the respondent.

**DECISION OF THE BOARD;** August 9, 1985

1. The applicant has referred a grievance in the construction industry concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The applicant, International Union of Operating Engineers Local 793 ("the union") and the respondent, Piggott Construction Limited" ("the employer") agree that they are bound to the provincial agreement between the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency effective from May 7, 1984 to April 30, 1986 ("the Agreement").

3. The union seeks a declaration that the employer has violated Article 3 - Union Security - of the Agreement, in particular clause 3.4 thereof respecting the subcontracting of work covered by the Agreement. There is no dispute that the work giving rise to this grievance is work coming within the scope of the Agreement. The union alleges that the work in issue was performed by a subcontractor who was not in contractual relations with the union as required by clause 3.4 as set out hereunder:

- 3.4a) The Employer agrees to engage only those sub-contractors and equipment rentals (except equipment dealers) who are in contractual relations with the Union to perform work set out in the classifications of this agreement, dredging, or as otherwise agreed to by the parties.
- b) Owner-Operators who perform work covered by this Agreement shall be signatory to an Agreement with the Union and shall also be:
  - i) a member in good standing of the Union; and
  - ii) in good standing on contributions under the Health Plan, Pension Plan, Training Fund and Working Dues, as required by this Agreement

If the Union advises an Employer bound by this Agreement that an owner-operator engaged by such Employer is in violation of this Article, the Employer shall within 24 hours replace such owner-operator.

The Board heard the evidence of Glen Budge and Canon Unsworth for the union and Dan Cavanagh for the employer. The findings of fact set out herein are based primarily on the

Board's assessment of the evidence of Budge and Cavanagh having regard for their demeanour as witnesses.

4. The employer had obtained a contract for work which included completing the excavation for the basement of an office tower in the City of Ottawa. When the employer acquired its contract, approximately 75% of the excavation had been completed by another contractor. The excavation involved the removal of rock and preparatory to seeking bids from subcontractors for this work, the employer estimated what it would cost were it to perform the work itself, based on the nature and quantity of sub-soil and rock to be removed and unit costs developed over its years of experience with such work. The employer uses such cost figures to assess the bids which it receives for work which it puts out to tender. The employer received bids from two subcontractors with approximately \$100,000 difference between them. It notified the low bidder by letter of intent that the employer would let a contract to it. When that bidder came to the work site to examine the work, it sought to qualify its bid to the extent that its price became virtually the same as the higher bidder. After analyzing this turn of events, the employer decided it would perform the work using its own forces.

5. Preparatory to undertaking the work itself, the employer examined the work and decided to remove the rock by mechanical means rather than by drilling and blasting, apparently because of a high risk of damage to an adjacent property were explosives to be used. The decision was made to use a piece of equipment called a hoe ram of a particular capacity. The Board was told that there are ten different sizes of hoe rams. The employer sought to find one with sufficient capacity which it could rent. The only one it could locate belonged to an excavator called Ken Gordon Excavations. It may be inferred from the evidence that the equipment was available to the employer only if it took an operator along with the equipment. The employer arranged for the equipment and the operator on a per diem basis and performed the work in question using this equipment and operator.

6. Budge, who is the business representative for the union in the Ottawa area, advised the respondent that Ken Gordon Excavations ("Gordon") was not under any collective bargaining arrangements with the union and asked that Gordon be removed from the job site and replaced with a subcontractor who satisfied the requirement of clause 3.4.

7. The Board is satisfied that the arrangements which the employer made with Gordon for the supply of the hoe ram equipment and operator constitute engaging a subcontractor within the meaning of clause 3.4 of the agreement for the same reasons stated by the Board in its decision in *Eton Construction Limited*, [1981] OLRB Rep. July 872. In that case, the employer had entered into an arrangement on a time and material basis for the performance of certain work which came within the collective agreement to which the employer was bound and about which work the collective agreement placed limitations on how it could be subcontracted. The Board finds on the evidence that Gordon was not under contractual relations with the union as required by clause 3.4. Furthermore, having regard to the language of clause 3.4 of the agreement and particularly the reference therein to subcontractors and equipment rentals (except equipment dealers), the Board finds that Gordon's relationship to the employer was that of a subcontractor within the meaning of clause 3.4. Since Gordon was not in contractual relations with the union as required by that clause, the employer's use of Gordon in those terms was a violation of clause 3.4 of the Agreement.

8. The union's referral includes a request for damages. The Board asked, in the course

of the proceedings, whether the parties wished the Board to remain seized respecting the amount of damages should the Board find liability in the employer. Both parties requested the Board to receive evidence on the amount of damages which would be owing. The amount of damages which the union is seeking is the sum which would have been paid in wages to its members and in contributions on their behalf made to the union's welfare and pension trust funds for the number of hours worked by Gordon's operator. In *Eton, supra*, the Board considered it proper to award damages on that basis for violations of the subcontracting provisions in the collective agreement, stating that it was "... now well established that the appropriate redress of a complaint such as is before us includes payment by the employer of an amount equal to the contributions to various trust funds, which would have accrued to members of the applicant who would have been employed by the respondent save for the respondent's violation of the collective agreement". In this respect see *Napev Construction Limited*, [1980] OLRB Rep. Feb. 260; *Re McKenna Brothers Ltd. and Plumbers Union Local 527*, 10 L.A.C. (2d) 273 (Shime) and *Re Blouin Drywall, Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, 57 D.L.R. (3d) 199. Since *Blouin Drywall* and *McKenna Brothers*, it has generally been sufficient for a trade union claiming damages for violation of the hiring hall or subcontracting provisions of its collective agreement, to simply establish that it had sufficient unemployed members at the times material to the grievance to have supplied the needs of the employer directly or through its subcontractor. In the instant case, the union did not adduce any evidence that unemployed members of the union were available at the time of and subsequent to the employer's violation of the agreement. Nor did the union adduce any evidence that there were subcontractors with employees who were members of the union available to perform the work in question. Therefore the union has failed to establish before the Board that the union or its members have suffered a loss as a result of the employer's violation of clause 3.4 of the agreement. Accordingly, there is no basis on which the Board can award the damages sought by the union.

9. In view of that result, it is unnecessary for the Board to deal with the arguments made in the alternative by employer counsel that the Board should not award damages even if it found a violation of the subcontracting clause.

10. Therefore, having regard to all of the evidence before it and pursuant to section 124 of the *Labour Relations Act*, the Board declares and directs that:

- (1) Piggott Construction Limited ("the employer") and the International Union of Operating Engineers, Local 793 ("the union") are bound to the provincial agreement between the Operating Engineers Employer Bargaining Agency and the Operating Engineers Employee Bargaining Agency effective from May 7, 1984 to April 30, 1986 ("the Agreement");
  - (2) the employer has violated clause 3.4 of Article 3 - Union Security - of the Agreement by subcontracting work covered by the Agreement to Ken Gordon Excavations contrary to the provisions of that clause; and,
  - (3) the employer shall cease and desist from violating clause 3.4 of the collective agreement.
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**1740-84-R Ontario Public Service Employees Union, Applicant, v. Sault College of Applied Arts and Technology, Respondent**

**Certification - Constitutional Law - Whether community college excluded from *Labour Relations Act* as crown agency - Whether denial of collective bargaining legislation for part-time employees of college contrary to Charter's freedom of association - Whether equality provision applying retroactively to proceedings commenced before Board - Whether Board having jurisdiction to declare external statute contrary to Charter**

**BEFORE:** R. O. MacDowell, Vice-Chairman, and Board Members I. Stamp and W. F. Rutherford.

**APPEARANCES:** Ian McGilp, Dianne Wintermute, Ivor Oram and Dev Matharu for the applicant; F. G. Hamilton and R. Wright for the respondent.

**DECISION OF THE BOARD; August 12, 1985**

1. This is an application for certification in which the union "OPSEU" seeks to represent a group of the respondent's part-time employees. The respondent takes the position that the Board has no jurisdiction to deal with the case. The respondent asserts that it is a "Crown Agency" and that, therefore, it is not covered by the *Labour Relations Act*. The union asserts the contrary. The union further argues that even if the respondent is a Crown Agency, any impediment to this Board's jurisdiction to consider this application has been removed by the adoption, in 1981, of the *Canadian Charter of Rights and Freedoms* ("the Charter"). We shall deal with each of these arguments in turn.

Is the Respondent a Crown Agency?

2. This is not the first time that the Board has had to consider whether a college of applied arts and technology is a Crown agency. That issue was definitively decided, in the affirmative, in a series of decisions in the late 1960's (see in particular: *Fanshawe College of Applied Arts and Technology*, [1967] OLRB Rep. Dec. 829). The union argues that these cases were wrongly decided and that, in any event, there have been significant changes in the legislative framework governing community colleges which would now warrant a different result.

3. In *Fanshawe*, the applicant union was the Civil Service Association of Ontario ("CSAO"), the predecessor of the present applicant. CSAO was seeking to represent what would now be described as a "support staff" unit of community college employees, excluding both academic staff and managerial personnel. There, as here, the respondent college asserted that it was a Crown agency. The college relied upon the extensive authority reserved to the Minister under what was then section 14a of the *Department of Education Act* (R.S.O. 1960, c.111, as amended by S.O. 1965, c.28) and the criteria set out by the Court of Appeal in *Regina v. Ontario Labour Relations Board ex parte Ontario Food Terminal Board*, (1963) 38 D.L.R. (2d) 531. In that case, the Court held that whether or not an entity is a Crown agent depends upon a number of factors including: the nature of the functions performed, the benefit

for whom the service is rendered, and the nature and extent of the powers entrusted to it. However, in the Court's view, the primary consideration was the nature and degree of control exercised or retained by the Crown. At the time, section 14a of the *Education Act* read as follows:

14a.-(1) Subject to the approval of the Lieutenant Governor in Council, the Minister may establish, name, maintain, conduct and govern colleges of applied arts and technology that offer programmes of instruction in one or more fields of vocational, technological, general and recreational education and training in day or evening courses and for full-time or part-time students.

(2) The Minister shall be assisted in the planning, establishment and co-ordination of programmes of instruction and services for such colleges by a council to be known as the Ontario Council of Regents for Colleges of Applied Arts and Technology composed of such members as may be appointed by the Minister.

(3) There shall be a board of governors for each college of applied arts and technology, which shall be a corporation with such name as the Minister may designate and shall be composed of such members and have such powers and duties, in addition to those under *The Corporations Act* as varied by the regulations, as may be provided by the regulations, and each board shall be assisted by an advisory committee for each branch of a programme of instruction offered in the college other than programmes of instruction referred to in subsection 5.

(4) For the purposes of subsection 1 and subject to the approval of the Minister, a board of governors may enter into an agreement with any organization representing one or more branches of industry or commerce or with any professional organization.

(5) Subject to the approval of the Minister, a board of governors of a college may enter into an agreement with a university for the establishment, maintenance and conduct by the university in the college of programmes of instruction leading to degrees, certificates or diplomas awarded by the university.

(6) The cost of the establishment, maintenance and conduct of a college shall be payable until the 31st day of March, 1966, out of the Consolidated Revenue Fund, and thereafter out of moneys appropriated therefor by the Legislature and out of moneys received from Canada for the purposes of technical education or other programmes of instruction of the college, moneys contributed by organizations that have entered into agreements with the board of governors of the college, fees paid by students and moneys received from other sources.

(7) Without restricting the generality of section 12, the Minister, subject to the approval of the Lieutenant Governor in Council, may make regulations with respect to colleges of applied arts and technology,

- (a) providing for the composition of the Ontario Council of Regents for Colleges of Applied Arts and Technology;
  - (b) providing for the composition of the boards of governors on a suitably representative basis and of the advisory committees thereof and for the appointment of the members of such boards and committees;
  - (c) prescribing the powers and duties of boards of governors and advisory committees, the manner of calling and conducting the meetings thereof and the procedure for the election or appointment of chairmen and officers;
  - (d) prescribing the type, content and duration of programmes of instruction to be offered;
  - (e) prescribing the requirements for admission to any programme of instruction, and prescribing the terms and conditions upon which students may remain in, or be discharged from, any programme of instruction;
  - (f) for the granting of certificates and diplomas of standing following successful completion of any programme of instruction;
  - (g) prescribing the qualifications and conditions of service of members of the teaching staffs of such colleges;
  - (h) providing for the payment of travelling allowances or expenses to members of the Ontario Council of Regents for Colleges of Applied Arts and Technology, boards of governors and advisory committees, and of the officers and employees of such colleges;
  - (i) requiring students to pay registration, tuition and laboratory fees in respect of any programme of instruction, and fixing the amounts and manner of payment thereof;
  - (j) providing for the admission of persons from outside Ontario, and prescribing fees payable by such persons in respect of any programme of instruction and the manner of payment thereof;
  - (k) providing for the incorporation of schools established under section 14 with such colleges.
- (8) No regulation made under subsection 7 applies to a university or to programmes of instruction given by a university in such colleges.

The employer argued that under section 14a the Minister retained fundamental control over the establishment, funding, programmes and governance of a community college, and that, therefore, the college was a Crown agency to which the *Labour Relations Act* had no application.

4. The Board in *Fanshawe College* considered the decision in *Ontario Food Terminal*, comparing and contrasting the facts in that case with those in other Crown agency cases, such as, *Metropolitan Meat Industry Board v. Sheedy* [1927] A.C. 899; *Governors of the University of Toronto v. Minister of National Revenue* [1950] Ex.C.R. 117; *Jamieson's Food Limited v. Ontario Food Terminal* [1961] S.C.R. 276; *City of Halifax v. Halifax Harbour Commissioners* [1935] S.C.P. 215; *Simmons v. Niagara Parks Commission* [1945] O.R. 326; *Bank Voor Handel En Scheepvaart N.V. v. Administrator of Hungarian Property* [1954] 1 All E.R. 969; and *Fox v. Newfoundland Government* [1898] A.C. 672. We do not think it is necessary to repeat that analysis here. It suffices to say that the Board then turned its attention to the situation at hand, and the effect of section 14a of the *Education Act*:



11. Having in mind the test of the degree of control and the manner in which it has been applied in the above cases, let us now consider the powers vested in the board of governors of the respondent college. Section 14a of The Department of Education Act provides that the board of governors are to have such powers and duties, in addition to those under The Corporation Act "as varied by the regulations, as may be provided by the regulations." (Each college, we would mention is a corporation). The board of governors can enter into agreements with organizations representing industry, commerce or professional organizations and universities. This authority, however, is subject to the approval of the Minister of Education. The cost of the establishment, maintenance and conduct of the colleges is to be paid out of moneys appropriated therefor by the Legislature and out of moneys received from other sources, i.e., the Federal Government, other organizations and fees. The Minister, subject to the approval of the Lieutenant-Governor-in-Council, has authority among other things to make regulations with respect to the colleges, including the appointment and composition of the board of governors, its powers and duties, all aspects of the program of instructions, admission and diploma requirements and the qualifications and conditions of service of the teaching staff. By the regulations passed under section 14a, the program of education proposed by the board of governors must be approved by the Council of Regents (which is also appointed by the Minister subject to the approval of the Lieutenant-Governor-in-Council). The Council of Regents may alter or modify the recommendations of the board of governors, and in turn any proposals or recommendations must be approved by the Minister. In the case of a building program, while the board of governors may choose the site and employ an architect, all plans and estimates of costs of construction ultimately must be approved by the Minister. Finally, while the board of governors may appoint a director of the college, principals for divisions of the college, a registrar, bursar, administrative, teaching and non-teaching staff as required, their salaries and wage rates are established by the Council of Regents and must be approved by the Minister.

12. The above abbreviated description of the authority of the board of governors of the respondent college and the limitations placed upon that authority is analogous to the powers possessed by the Commissioners of the Halifax Harbour Commissioners and the Niagara Parks Commission and is even more restricted, in our view, than the authority given to the Custodian of Enemy Property. In short, the statute establishing the board of governors gives them little independent discretion. All of their actions to a very substantial degree are subject to direct or indirect control by either or both the Council of Regents and the Minister. We accordingly are of the opinion that at common law the respondent is a servant or agent of the Crown.

13. The *Crown Agency Act* R.S.O. 1960 c. 81 defines a Crown agency in section 1 as follows:

In this Act "Crown Agency" means a board, commission, railway, public utility, university, manufacturing, company or agency owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario, or under the authority of the Legislature or the Lieutenant Governor in Council.

This Board in the *Ontario Food Terminal Board Case* (supra) expressed the view that the Crown Agency Act was enacted by the Legislature solely to clarify the position of a Crown agency as a servant or agent of the Crown and was simply restating what constituted an agent of the Crown under the common law. Accordingly, this Board was of the opinion that it was not really necessary for it to consider the Act. Since it had been argued in that case, however, that the Ontario Food Terminal Board did not fall within the definition of a "Crown Agency" as defined in the Act the Board did give consideration to the meaning of the words "owned, controlled and operated" in the definition. While not giving an overall interpretation to these words, the Board concluded that the Ontario Food Terminal Board was not a "Crown Agency" as defined in Section 1 of the Crown Agency Act. The position which we adopt in the instant application is the same as that of the Board in the *Ontario Food Terminal Board Case*, in that we are not really called upon to make a finding as to the position of the respondent under the Crown Agency Act. Having regard, however, to the high degree of control exercised by the Minister over the

respondent college, there is ample evidence to support a finding that the respondent is a "Crown Agency" within the meaning of the Act.

In the result, the Board determined that it did not have jurisdiction to entertain the certification application because the *Labour Relations Act* did not apply to a Crown agency. The Board reached a similar conclusion in *George Brown College of Applied Arts and Technology*, [1968] OLRB Rep. May 165, and *Centennial College of Applied Arts and Technology*, [1968] OLRB Rep. May 170. So did the Court in *Canadian Imperial Bank of Commerce v. Monette; Board of Governors of Algonquin College of Applied Arts and Technology, Garnishee* [1972] 1 O.R. 407, where it was held that the *Divisions Courts Act*, R.S.O. 1960, c.110 did not apply to the respondent college because it was a Crown agency.

5. The affairs of community colleges are no longer governed by the *Education Act*. The relevant statute is now *The Ministry of Colleges and Universities Act*, R.S.O. 1980, c.272. The powers set out in what was once section 14a of the *Education Act*, can now be found in sections 5 and 7 of the *Ministry of Colleges and Universities Act*:

5.-(1) Subject to the approval of the Lieutenant Governor in Council, the Minister may establish, name, maintain, conduct and govern colleges of applied arts and technology that offer programs of instruction in one or more fields of vocational, technological, general and recreational education and training in day or evening courses and for full-time or part-time students.

(2) The Minister shall be assisted in the planning, establishment and co-ordination of programs of instruction and services for such colleges by a council to be known as the Ontario Council of Regents for Colleges of Applied Arts and Technology composed of such members as may be appointed by the Lieutenant Governor in Council.

(3) There shall be a board of governors for each college of applied arts and technology, which shall be a corporation with such name as the Minister may designate and shall be composed of such members and have such powers and duties, in addition to those under the *Corporation Act* as varied by the regulations, as may be provided by the regulations, and each board shall be assisted by an advisory committee for each branch of a program of instruction offered in the college other than programs of instruction referred to in subsection (5).

(4) For the purposes of subsection (1) and subject to the approval of the Minister, a board of governors may enter into an agreement with any organization representing one or more branches of industry or commerce or with any professional organization.

(5) Subject to the approval of the Minister, a board of governors of a college may enter into an agreement with a university for the establishment, maintenance and conduct by the university in the college of programs of instruction leading to degrees, certificates or diplomas awarded by the university.

(6) The cost of the establishment, maintenance and conduct of a college shall be payable out of moneys appropriated therefor by the Legislature and out of moneys received from Canada for the purposes of technical education or other programs of instruction of the college, moneys contributed by organizations that have entered into agreements with the board of governors of the college, fees paid by students and moneys received from other sources.

(7) The Minister, subject to the approval of the Lieutenant Governor in Council, may make regulations with respect to colleges of applied arts and technology.

(a) providing for the composition of the Ontario Council of Regents for Colleges of Applied Arts and Technology;

- (b) providing for the composition of the boards of governors on a suitably representative basis and of the advisory committees thereof and for the appointment of the members of such boards and committees;
- (c) prescribing the powers and duties of boards of governors and advisory committees, the manner of calling and conducting the meetings thereof and the procedure for the election or appointment of chairmen and officers;
- (d) prescribing the type, content and duration of programs of instruction to be offered;
- (e) prescribing the requirements for admission of any program of instruction, and prescribing the terms and conditions upon which students may remain in, or be discharged from, any program of instruction;
- (f) for the granting of certificates and diplomas of standing following successful completion of any program of instruction;
- (g) prescribing the qualifications and conditions of service of members of the teaching staffs of such colleges;
- (h) providing for the payment of travelling allowances or expenses to members of the Ontario Council of Regents for Colleges of Applied Arts and Technology, boards of governors and advisory committees, and of the officers and employees of such colleges;
- (i) providing for a payment of a *per diem* allowance to the members, except the chairman, of the Ontario Council of Regents for Colleges of Applied Arts and Technology;
- (j) requiring students to pay registration, tuition and laboratory fees in respect of any program of instruction, and fixing the amounts and manner of payment thereof;
- (k) providing for the admission of persons from outside Ontario, and prescribing fees payable by such persons in respect of any program of instruction and the manner of payment thereof.

(8) No regulation made under subsection (7) applies to a university or to programs of instruction given by a university in such colleges.

(9) The chairman of the Ontario Council of Regents for Colleges of Applied Arts and Technology shall be paid such remuneration and shall be entitled to such other benefits as may be determined by the Lieutenant Governor in Council.

• • •

7. Subject to the approval of the Lieutenant Governor in Council, the Minister may make regulations,

- (a) prescribing the terms and conditions under which awards or grants provided out of the moneys appropriated by the Legislature may be made to students enrolled in post-secondary institutions, prescribing the amounts of such awards and the methods of calculation thereof and the persons eligible therefor, defining the types, classes and sub-classes of awards and grants, fixing the maximum amount that may be awarded or granted to any applicant and authorizing the Minister to determine the amount, up to the maximum that may be awarded or granted, to an applicant;
- (b) providing for the recovery of all or any of the moneys awarded or granted to any



student enrolled or purporting to be enrolled in a post-secondary institution who was not eligible for the award or grant or who fails to comply with any of the terms and conditions under which such moneys were awarded or granted;

- (c) providing for the apportionment and distribution of moneys appropriated or raised by the Legislature for university, college and other post-secondary educational purposes;
- (d) prescribing the conditions governing the payment of legislative grants;
- (e) defining "enrolment" and "student" for the purpose of legislative grants to post-secondary educational institutions recognized by the Minister for the purpose of such grants, and requiring that "enrolment" be subject to the approval of the Minister;
- (f) prescribing forms and providing for their use;
- (g) authorizing the Deputy Minister of Colleges and Universities or any officer of the Ministry to exercise the power to approve loans under section 8.

6. It will be seen that the legislation is very similar to what it was in 1967. In addition, pursuant to Regulation 640 passed under the authority of the *Ministry of Colleges and Universities Act*, it is clear that the appointment of the Council of Regents and the board of governors of a college remains within the firm control of the Crown. Indeed, if anything, the influence of local municipal councils and the independence of the board of governors have been reduced. Recommendations as to the educational needs of the municipal area for which the college is established, must be submitted to the Minister for approval. The board of governors cannot deal with real property in any way without the written approval of the Minister. Plans for the construction of college buildings, as well as the process of tenders, are both subject to the approval of the Minister. The board of governors has the authority to appoint, classify, promote, suspend, transfer, or remove employees subject to salary and wage rates, and according to the terms and conditions established by the Council of Regents but only as approved by the Minister. Recommendations for new educational programmes at a college must also be approved by the Minister, as must any programme of instruction leading to a certificate or diploma, except those given by an accredited university.

7. It appears to the Board that there have not been any legally significant changes in the legislative framework since the Board's decision in *Fanshawe College*. There has been a reorganization of ministerial responsibilities and some changes in detail, but the Minister retains a substantial degree of control over the operation of the colleges. The fact that the Minister may permit a degree of local autonomy, and may not be called upon to actively intervene very often, does not diminish his ultimate authority. We are unable to conclude, therefore, that *Fanshawe* was wrongly decided, or that the current statutory framework is sufficiently different to dictate a different result. The Crown retains a substantial degree of control over all important aspects of the colleges' operations. In our opinion, community colleges were, and remain, Crown agencies, to which the *Labour Relations Act* has no application.

8. We are reinforced in this view by the legislative treatment of the employees of community colleges in the years following the *Fanshawe* decision. The evolution of collective bargaining legislation strongly suggests that the Legislature itself regarded the colleges as Crown agencies, and the employees of community colleges as a distinct class of Crown employee.

9. As we have already noted, community colleges were initially created under and

governed by the *Education Act*, which was then primarily concerned with the regulation of primary and secondary schools. The Act did not deal with collective bargaining matters. In 1971, the Legislature created the Department of Colleges and Universities (see *The Department of Colleges and Universities Act, 1971*, S.O. 1971, c.66). Again, there was no mention of employee collective bargaining concerns. In 1972, however, there was a flurry of legislative activity touching upon the collective bargaining interests of Crown employees. On June 23, 1972 the Legislature passed the *Crown Employees' Collective Bargaining Act* (S.O. 1972, c.67), which established collective bargaining rights for civil servants, but expressly excluded employees of community colleges. However, only a week later, on June 30, 1972, the Legislature adopted an amendment to the *Ministry of Colleges and Universities Act, 1971* (S.O. 1972, c.114) which provided that:

6a.-(1) In this section,

- (a) "employee" means a person employed by a board of governors of a college of applied arts and technology but does not include,
  - (i) a person employed in a managerial or confidential capacity,
  - (ii) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity,
  - (iii) a person who is employed on a casual or temporary basis unless he has been so employed continuously for a period of six months, or more, or
  - (iv) a person engaged and employed outside Ontario;
- (b) "employer" means the Crown in right of Ontario.

(2) Except where inconsistent with this section, the provisions of *The Crown Employees Collective Bargaining Act, 1972* apply *mutatis mutandis* to the employer, to all boards of governors of colleges of applied arts and technology and to all employees as if such provisions were enacted in and formed part of this section.

(3) The employer shall be represented in the case of boards of governors of Applied Arts and Technology by one or more persons appointed by the Ontario Council of Regents for Colleges of Applied Arts and Technology.

[emphasis added]

10. The result of these amendments was that, for a time, the employees of community colleges were treated in the same manner as civil servants. Although they were "employed by a board of governors of a college", their ultimate employer was expressly said to be "the Crown". This framework was changed in July, 1975, when the Legislature passed the *Colleges Collective Bargaining Act, 1975* (S.O. 1975, c.74), which established a comprehensive framework for collective bargaining for community college employees. In that Act, the employer is again referred to as the board of governors of a college, but there is no equivalent of section 6a(1)(b) of the predecessor legislation. However, the *Colleges Collective Bargaining Act* does not speak to the issue of whether community colleges are or remain Crown agencies, and there is nothing in the Act to indicate any change in their status. Nor do we think the union can derive much assistance from a comparison of the definition portions of these various statutes. Under section 1(1)(g) of the *Crown Employees Collective Bargaining Act, 1972* (now

R.S.O., 1980 c.108), the term “employee means a Crown employee as defined in the *Public Service Act* but does not include...an employee of a college of applied arts and technology”. Under section 1(e) of the *Public Service Act* (now R.S.O. 1980, c.418), the term “Crown employee means a person employed in the service of the Crown or any agency of the Crown, but does not include an employee of Ontario Hydro, or the Ontario Northland Transportation Commission”. When read together, it certainly seems as if the Legislature was trying to make it clear that certain Crown employees, employed by particular Crown agencies - community colleges - would nevertheless be excluded from the *Crown Employees Collective Bargaining Act*, and, of course, in the case of community college employees, the Legislature was passing companion legislation to deal with them. The fact that the legislation did not deal with all of them does not mean that they were any less Crown employees, nor that the colleges were not Crown agencies; moreover, it would be rather odd if the colleges were Crown agencies for all purposes except negotiations for certain part-time employees. It appears to us that section 6a(1)(b) in the transitional legislation, *supra*, was intended to be declaratory of the legal status quo and we do not think its omission from the later legislation respecting collective bargaining for colleges, altered the status of these educational institutions or their employees. On balance, therefore, we are of the view that the Legislature continued to regard the community college staff as a special category of Crown employee, working for a Crown agency and warranting special legislative treatment.

11. For the foregoing reasons, we are not persuaded that the *Fanshawe* decision is wrongly decided, or that the changes to the relevant statutes since 1967, dictate a different result. We do not think the *Labour Relations Act* applies to the employees of a community college. It remains to be determined whether the passage of the *Constitution Act, 1981* and the adoption of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”) alters that conclusion.

### The Charter Issue

12. The union argues that if the part-time community college employees are not covered by the *Labour Relations Act*, then by design or inadvertence, the Legislature has abridged their fundamental right to freedom of association guaranteed by section 2(d) of the *Charter*. The employees are not covered by the *Labour Relations Act* because that statute cannot apply to Crown agencies without specific legislative provisions to that effect. Section 11 of the *Interpretations Act*, R.S.O. 1980, c.219) reads as follows: “No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby”. No such provisions exist. But, the part-time employees of community colleges are also excluded from both the *Crown Employees Collective Bargaining Act* and the *Colleges Collective Bargaining Act* (see sections 1(1)(g) and Schedule 2(VI), respectively). As a result, this group of part-time employees has no legislative protection or mechanism available to them should they seek to form a trade union or participate in collective bargaining. They have been left out. They have no certification process, no statutory right to strike, no protected right to organize, and no clear remedy should their employer discriminate against employees who join a trade union or seek to bargain collectively.

13. The union argues that the absence of such legislative protection seriously interferes with the employees’ freedom of association guaranteed by the *Charter*. Counsel for the union



argues that the Board should apply section 2(d) of the *Charter* to “read down” (i.e. ignore) section 11 of the *Interpretations Act*, insofar as it has the effect of excluding part-time community college employees from coverage by the *Labour Relations Act*. Counsel argues that when section 11 is “read down” in this way, any impediment to this Board’s jurisdiction will be removed because the part-time employees will then be covered by the *Labour Relations Act*.

14. The ambit of section 2(d) of the *Charter* has recently been the subject of considerable judicial debate. The present legal situation is by no means clear. The Ontario Courts have taken a relatively liberal view, suggesting that the *Charter* protects a broad range of employee rights to organize and bargain collectively (see *Re Service Employees’ International Union, Local 204 and Broadway Manor Nursing Home et al.*, (1983) 44 O.R. (2d) 392). The Federal Court of Appeal has taken a narrower view, holding that collective bargaining, as such, is not protected at all by the guarantee of freedom of association (see *Public Service Alliance of Canada v. The Queen in Right of Canada*, 84 CLLC, 14,053; and to the same effect see the decision of the British Columbia Court of Appeal in *Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 58 et al.*, 84 CLLC, 14,036). Furthermore, as a matter of historical fact, collective bargaining predated collective bargaining legislation. It has both existed and even flourished in some situations, without any legislative support at all. Teachers for example, have bargained collectively and successfully prior to the passage of the *School Boards and Teachers Collective Negotiations Act* in 1975. Until the 1970’s, collective bargaining in England was subject only to common law rules. However, we do not think it is necessary to speculate about the extent of the constitutional protection for freedom of association. Even *assuming* that the *absence* of collective bargaining legislation infringes upon the right to freedom of association for part-time community college employees, we do not think that this means that this Board has jurisdiction to entertain this certification application.

15. We do not doubt that the Constitution is the supreme law of Canada or that any law inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect (see section 52 of the *Constitution Act*, 1981). Nor do we doubt that in administering its constituent statute the Board must have regard to Constitutional guarantees, and should interpret the provisions of its own Act in light of those guarantees. But it is one thing to consider the *Charter* as an aid to interpretation of the *Labour Relations Act*, or even to decide that a provision of the *Labour Relations Act* is inconsistent with *Charter* guarantees. It is quite another to suggest that the Board should apply the *Charter* to selectively “read down” an *external* statute - here the *Interpretations Act* - so as to *extend* this Board’s jurisdiction to a particular (but relatively narrow) class of crown employees over whom we would otherwise have no authority. From time to time this Board may have to construe an *external* statute in order to properly carry out its responsibilities under the *Labour Relations Act*, but we do not think we have any jurisdiction to reach out, strike down, or declare such statute partially inoperative. Indeed, it is by no means clear that even that would be effective, since the principle that statutes do not bind the Crown would appear to have a common-law basis quite apart from the *Interpretations Act*.

16. In our view, the role urged upon us by the union is more properly and appropriately exercised by the superior courts (see section 24 of the *Constitution Act*, 1981) which are uniquely placed to declare inoperative common-law rules or legislative enactments, and grant such ancillary relief as may appear appropriate. While we recognize the union’s concern, it

could equally be argued that any collective bargaining anomaly which exists stems solely from the exclusion of part-time employees from the special legislation tailored specifically for the needs of the colleges - not from their exclusion from the *Labour Relations Act* because they are a category of crown employee. It is not the *Interpretations Act* or the Crown immunity principle which gives rise to the problem; it is the exclusion of part-time employees from the legislation governing collective bargaining by community college employees. If anything is to be "read down" or "struck down", it is that exclusion. The applicant does not challenge the propriety of separate legislation for Crown employees or community college teachers, and indeed, cannot do so without calling into question the very statutes by which it holds bargaining rights for such employees. The applicant maintains that it has valid representational rights under those special statutes but, in addition, urges this Board to invoke the Charter to nullify the notion of Crown immunity as it applies to a particular group of part-time crown employees so that, (it is said), they will fall within the ambit of the *Labour Relations Act*, and this board's jurisdiction. We decline to do so. From a policy point of view, it would not make much "collective bargaining sense" if we were to find that full-time community college workers operate under one set of legal rules, and part-time employees fall within another, quite different legal regime, but in any event, we do not think we have jurisdiction to do what the applicant here seeks.

17. Prior to the issuance of the decision in this matter, counsel for the union made further argument, based upon section 15 of the *Charter of Rights* which had come into effect after the hearing but before the release of the Board's decision. Those arguments can be dealt with briefly and ultimately, along the same lines as the earlier argument, based upon section 1(d) of the *Charter*.

18. In the first place, it is apparent that section 15 of the *Charter* is not, and was not intended to be retrospective. It was intended to come into full force and effect in April 1985, and both Parliament and the provincial Legislatures were given the opportunity, prior to that date, to remove any apparent inconsistencies. In the instant case, the application was filed, processed, argued and substantially determined on the basis of legislation and legal rules in effect *prior* to section 15 coming into effect. It certainly would be odd if this Board's jurisdiction could change between the date of the hearing and the date of the issuance of a decision - at least in the absence of some express provision that cases already "in the works" would immediately become subject to different legal rules. This is particularly so, where, as here, the Board is required to make certain factual and legal determinations as at the "terminal date" established under section 103(2)(j) of the Act, and, of course, well before April 15, 1985. However, even if we were to accept that section 15 has application to this case (which we do not), it would not alter the result. There being no challenge to the *Colleges Collective Bargaining Act*, *per se*, the only result of the application of section 15 would be a finding that part-time community college workers are, without justification, denied the collective bargaining rights of their full-time colleagues. That conclusion could logically lead only to a determination that the part-time exclusion in the *Colleges Collective Bargaining Act* was inoperative, not that the subject employees should fall under the *Labour Relations Act*. Indeed, the section 15 argument highlights the limited jurisdiction of this Board and the appropriate forum in which the applicant should seek such relief as may be available to it.

19. In summary, we find that the individuals whom the applicant union seeks to represent are employees of a Crown agency. They are not covered by the *Labour Relations Act*, nor does the Board have jurisdiction to "read down" the *Interpretations Act* or the

*Colleges Collective Bargaining Act* so as to bring the subject employees within our jurisdiction. If the employees have any remedy at all, it is one which must be sought in the courts, or from the Legislature.

20. For the foregoing reasons, this application is dismissed.

#### CONCURRING OPINION OF W. F. RUTHERFORD;

With some reluctance, I agree with the conclusion that my colleagues have reached. I do not think that part-time employees of a community college are covered by the *Labour Relations Act*. However, I am troubled by the fact that they do not appear to be covered by any other collective bargaining legislation either. They are left without statutory recognition or protection of rights which have been available to most workers for more than forty years, and which have been available to their full-time colleagues for more than a decade. Why? Certainly I can think of no collective bargaining or public policy reason for excluding part-time employees. Part-time employees bargain collectively in nursing homes, hospitals, school boards, municipal corporations, the civil service, and throughout the private sector. Why should community colleges be different? There may be a reason for special treatment (a separate bargaining unit for example), but I can think of no reason why part-time workers should not have the same general collective bargaining rights as full-time workers. Collective bargaining may be possible without legislative protection, but it is unlikely to be very successful. To extend collective bargaining rights to full-time community college workers, but deny them to part-time employees, is an unjustifiable form of discrimination and, in my view, contrary to the Charter guarantee of equal protection of the law. However, I agree with the majority that the employees' remedy, if any, lies with the Legislature or the Courts and not this Board.

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**1148-85-U State Contractors Limited, Applicant, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552; Jerry Boyle, E. Deroche, W. Smith, Respondents**

**Strike - Two employees refusing to perform scheduled work - Concerted refusal constituting strike - Cessation of work occurring although employees performing alternate work assigned in different location - Board exercising discretion to make declaration of unlawful strike**

**BEFORE:** R. A. Furness, Vice-Chairman.

**APPEARANCES:** D. Jane Forbes-Roberts, Mario Cossarini and George Opacic for the applicant; L. Steinberg and J. Boyle for the respondents.

#### DECISION OF THE BOARD; August 16, 1985

1. The applicant has applied to the Board for relief under section 135 of the *Labour Relations Act*.
2. In a decision dated August 8, 1985, the Board issued the following decision and direction:



The hearing in this matter was held on August 8, 1985, in Windsor. At the conclusion of the hearing the Board issued the following decision:

For reasons to be given in writing, the Board finds that the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, has called or authorized an unlawful strike and that Jerry Boyle an officer, official or agent of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, has counselled, procured, supported or encouraged an unlawful strike and that E. Deroche and W. Smith as employees of State Contractors Limited have engaged in an unlawful strike at the University of Windsor's tunnel expansion project commencing on August 6, 1985. In the exercise of its discretion the Board makes the following direction:

- I The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552, is directed to cease and desist from calling or authorizing an unlawful strike.
- II Jerry Boyle is directed to cease and desist from counselling, procuring, supporting or encouraging an unlawful strike.
- III E. Deroche and W. Smith are directed to cease and desist from engaging in an unlawful strike and are to perform the work which may be assigned to them, by State Contractors Limited commencing on August 9, 1985, at the University of Windsor's tunnel expansion project.

3. The reasons for that decision are now set forth. The applicant and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552 ("Local 552") are bound by the terms of a provincial collective agreement between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council (the "provincial collective agreement") with respect to the industrial, commercial and institutional sector of the construction industry. This provincial collective agreement became effective on May 14, 1984, and remains in effect until April 30, 1986. This application arises out of an incident which occurred on August 6, 1985, at the applicant's job at the University of Windsor's tunnel expansion project (the "job").

4. In order to understand the incident which occurred on the job on August 6, 1985, it is necessary to refer to some concerns of Jerry Boyle the business manager of Local 552. The provincial collective agreement contains the following article:

24.6 Subject to existing jurisdictional agreements between trades, decisions of record, or established area practice, all brackets, hangers and pipe supports that are not specifically itemized and listed in a standard manufacturers' catalogue, are to be fabricated by members of the Union.

Mr. Boyle was concerned that article 24.6 was being violated by the applicant. He conveyed these concerns to Mario Cossarini, a branch manager for the applicant. The applicant had contracted to install and was in the process of installing pipe support brackets at the job. The pipe support brackets used on the job were supplied to the applicant by Forest Machine & Manufacturing Inc. ("Forest"). Mr. Cossarini contacted Forest on this concern of Mr. Boyle and received the following letter (the "letter"):

June 26, 1985.

State Mechanical Contractors.

ATT: Mario;

Per your order #250732-2002, we fabricated pipe support brackets. The labour was performed by a member of Local 552 Plumbers and Pipefitters.

Sincerely

Bernard Plant'',  
President

5. Mr. Cossarini advised Mr. Boyle of this state of affairs. Mr. Boyle was aware that Peter Salter, a member of Local 552, was one of the owners of Forest. Mr. Salter has retained his membership in Local 552. In 1981 Forest granted voluntary recognition to Local 552. While the collective agreement between Forest and Local 552 was not before the Board, it is clear that Forest, pursuant to the collective agreement, made contributions to the Mechanical Contractors Association of Windsor Industry Fund on behalf of Mr. Salter and on isolated occasions made similar contributions on behalf of another employee who was a member of Local 552. The Board was informed by Mr. Boyle that there was nothing in either the collective agreement or the constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada which would prevent Mr. Salter from performing the work of fabricating pipe support brackets.

6. Mr. Cossarini believed that the applicant was using pipe support brackets on the job which had been fabricated by Forest by a member or members Of Local 552 and that the applicant was not in violation of article 24.6. Mr. Boyle believed that Local 552 was losing the employment of at least one of its members at Forest. The difference in perceptions, and they are merely perceptions, of Mr. Cossarini and Mr. Boyle arises from Mr. Cossinari's belief that if the material is delivered to Forest in pre-cut lengths of twenty feet it would enable Mr. Salter to perform the fabrication by himself. Mr. Boyle on the other hand envisaged the material being delivered to Forest in lengths which would weigh six hundred pounds and based upon his experience it would require at least two men to fabricate the pipe support brackets.

7. Both men relied on their perceptions which were not based upon an empirical approach to the issue between the applicant and Local 552. Actual evidence was not to interfere with their pre-conceptions. In the opinion of the Board the approach of Mr. Boyle was high-handed and unfair. It is the responsibility of Local 552 to police all of its collective agreements and to ascertain the facts before adopting a position that one or more collective agreements had or had not been violated. Apparently, Mr. Boyle did not do this. At the time of the hearing on August 8, 1985, Mr. Salter was shortly to appear before the executive board of Local 552

for an investigation of his conduct and Local 552 was still in the process of preparing grievances arising out of the fabrication and installation of the pipe support brackets. The spirit and intent of the *Labour Relations Act* is to resolve differences by means of arbitration without stoppages of work. The arbitration procedure under the Act was available to Local 552. It was not used before the incident which occurred on the job on August 6, 1985. While Local 552 may use negotiation and self-help to endeavour to settle differences with the applicant it is not entitled to engage in unlawful conduct to achieve its desired ends.

8. On August 4, 1985, Mr. Cossarini advised Mr. Deroche who in turn advised Mr. Smith to report to the job on August 6, 1985. Three or four pipe support brackets were there to be installed together with the hanging of about two hundred feet of pipe. Mr. Cossarini had originally laid out the job and Mr. Deroche was aware of what was to be done on the job on August 6, 1985. There is a conflict in the evidence of Mr. Cossarini and Mr. Boyle. Having regard to the demeanour of the two witnesses the Board accepts the evidence of Mr. Cossarini in preference to the evidence of Mr. Boyle where there is a conflict in the evidence. The Board finds that, acting upon the advice and instructions of Mr. Boyle, Mr. Deroche and Mr. Smith on the job on August 6, 1985, refused either to install the remaining three or four pipe support brackets or to hang pipe on those pipe support brackets which had previously been installed. When Mr. Cossarini was made aware of this refusal he assigned the two employees to another location where they were given different work.

9. If a strike did occur on the job on August 6, 1985, it was clearly during the term of the provincial collective agreement. Section 72 provides that where a collective agreement is in operation no employee bound by the collective agreement shall strike. Section 1(1)(o) provides:

“strike” includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

Did Mr. Deroche and Mr. Smith engage in an unlawful strike on the job on August 6, 1985? In the opinion of the Board they did engage in an unlawful strike. Their refusal to work on the job amounted to a refusal to work in combination or in concert or in accordance with a common understanding and was also concerted activity designed to restrict or limit output. Counsel for the respondents relied on the decision of the Board in *Wharton Industrial Developments Ltd.*, [1982] OLRB Rep. July 1105, as establishing the principle that where an employer schedules other work there has not been a cessation of work and that therefore a strike has not occurred. The factors in *Wharton Industrial Developments Ltd.*, *supra*, are quite different from the facts in the instant application. In *Wharton Industrial Developments Ltd.*, *supra*, the sub-contractors of *their own volition* decided not to schedule certain work and the Board decided that accordingly there was no cessation of work. In the instant application Mr. Cossarini, on behalf of the applicant, required work to be performed at the job and the refusal constituted a strike within the meaning of section 1(1)(o). Such a strike was unlawful. The fact that Mr. Cossarini was prepared to make alternative work available to the two men did not nullify their earlier refusal to work at the job. The work which they were initially expected to do at the job was not done and there was no suggestion that such work was being performed on the date of the hearing of this application. An employer's flexibility in providing other work at a different location does not, having regard to the nature of the construction industry, mean that a strike did not occur. The scheduled work at the job was not performed while the applicant clearly required and continued to require such work to be performed.



Counsel for the respondents relied upon the equitable doctrine of “clean hands” in urging the Board not to issue a direction against the respondents. In the view of the Board the evidence completely failed to establish that the conduct of the applicant was tainted by unattractive conduct. Mr. Cossarini and the applicant acted on a reasonable belief that the pipe support brackets conformed with article 24.6 of the provincial collective agreement. A basis for a contrary belief was not established before the Board.

10. The Board has a discretion under section 135 in deciding whether to make a declaration. In *Bechtel Canada Ltd.*, [1977] OLRB Rep. May 269, the Board stated at page 273:

19. Before determining the legality of this work stoppage, a preliminary issue must be addressed. Since both the strike declaration and direction available under section 123 [now section 135] are discretionary remedies, they do not issue as of right. The Board's general practice has been to refuse to exercise its discretion to issue either a declaration of an unlawful strike or a cease and desist order where the work stoppage has ended before the hearing as is the case here. (For a review of the practice and the rationale see the *Acoustical Association* case, [1975] OLRB Rep. July 539, *Beatty Bros.* (1965), 66 CLLC para. 16,049 and *National Refractories* (1963), 63 CLLC para. 16,276.)

20. The Board has consistently stated, however, that it will depart from this general practice of refusing to grant either a declaration or a direction in the face of the existence of any one or more of the following three circumstances: *firstly*, where the evidence establishes a past practice of unlawful strike activity, *secondly*, where the evidence indicates that the unlawful activity is likely to recur or *thirdly* where the unlawful strike upon which the application is based has implications which extend beyond the immediate parties. Thus before addressing the merits of the work stoppage which is the subject of this application, we must decide whether, even if the stoppage were found to be illegal, we would exercise our discretion to make a declaration of illegality or issue a direction in relation to it.

In the instant case the strike was still in progress on August 8, 1985, the date of the hearing. The Board is satisfied that, having regard to the roots of the problem as envisaged by Local 552, the unlawful activity was likely to continue.

11. In giving advice and instructions to Mr. Deroche and Mr. Smith, Mr. Boyle clearly counselled, procured, supported or encouraged an unlawful strike. Moreover, Mr. Boyle in his capacity as business manager of Local 552 was acting within the scope of his authority on behalf of Local 552 as an officer, official or agent. In these circumstances his conduct on August 6, 1985, at the job is deemed to be an act or thing done on behalf of Local 552 by virtue of the provisions of section 99(2) of the *Labour Relations Act*. Accordingly, Local 552 called or authorized an unlawful strike on August 6, 1985.

12. For these reasons the Board made the decision and the direction on August 8, 1985.

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**0412-85-U; 0413-85-U** S. Wright, Dinah Teffer, M. A. Mothersell, Andrea Porter and C. Boreland, Complainants, v. Retail, Wholesale and Department Store Union, Respondent, v. **The T. Eaton Company Limited**, Intervener; Suzanne O'Hagan, Barbara Murray, Jean Robbins, Jeff Nelander, Maria Santos and Jean Christie, Complainants, v. Retail, Wholesale and Department Store Union, Respondent, v. The T. Eaton Company Limited, Intervener

**Duty of Fair Representation - Ratification and Strike Votes - Unfair Labour Practice - Union not conducting ratification vote as per usual practice - Signing agreement upon ratification by International President - Whether bad faith - Vote to ascertain wishes of striking employees as to return to work not constituting ratification or strike vote - Signing of agreement to avoid possible termination to avoid possible termination application not contrary to s.80(2)**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *J. A. Ronson* and *P. V. Grasso*.

**APPEARANCES:** *Stewart D. Saxe*, *Cheryl Elliot*, *Barbara Murray* and *Leslie Freeman* for the complainants; *James Hayes*, *Patrick Macklem* and *Thomas Collins* for the respondent; *F. G. Hamilton*, *Q.C.* and *R. A. Hubert* for the intervener.

**DECISION OF IAN C. SPRINGATE, ALTERNATE CHAIRMAN, AND BOARD MEMBER P. V. GRASSO;** August 19, 1985

1. These are two complaints under section 89 of the *Labour Relations Act* which allege that Retail, Wholesale and Department Store Union ("the union") has violated sections 68, 72 and 80 of the Act. The complainants in File No. 0412-85-U are employees of The T. Eaton Company Limited ("the company") at its store at the Scarborough Town Centre in the City of Scarborough. The complainants in File No. 0413-85-U are employed by the company at its Bramalea store in the City of Brampton.

2. Most of the facts giving rise to the complaints are not in issue. Indeed, the complainants and the union filed with the Board a jointly executed document setting out many of the relevant facts. The parties also agreed that the Board could rely on the facts set forth in the Board decision in *T. Eaton Company Limited*, [1985] OLRB Rep. March 491. The only witness called in these proceedings was Mr. Thomas Collins, an international representative of the union responsible for co-ordinating the union's bargaining activity at the six company stores where it holds bargaining rights.

3. Between March 28 and July 11, 1984, the union was certified to represent employees at six of the company's stores in Southern Ontario, including the Bramalea store and the store at the Scarborough Town Centre. In all, the union became the bargaining agent for approximately 1,000 of the company's employees. These employees represented less than four per cent of the company's total work force of about 35,000 employees.

4. The union's general practice is to acquire its bargaining rights in the name of the international union. After a first collective agreement has been entered into, it will generally transfer the bargaining rights to a local of the union. In line with this general practice, during

the union's organizing campaign employees were approached to sign applications for membership into the international union as opposed to a local of the union. The international union was certified by the Board as the bargaining agent of employees in the various bargaining units. The resulting bargaining rights were never transferred to a local but rather continue to be held by the international.

5. Negotiations for first collective agreements between the company and the union commenced on May 16, 1984. It was the union's hope that in these negotiations it would be able to make major progress towards improving the terms and conditions of employment of the employees it represented. However, apart from a 7.8 per cent general wage increase implemented by the company for both unionized and non-unionized employees, the company took the position that the wages and benefits being received by the employees were competitive and appropriate. Although the company did agree to a number of proposals which would afford increased job protection to employees and enable the union to challenge certain company actions, the company adamantly opposed most of the union's proposals that would limit management's flexibility. The fact that the union represented only about four per cent of the company's work force meant that the company was in a relatively strong bargaining position. Further, the company was prepared to make full use of its bargaining power in order to resist most of the union's demands.

6. On November 18, 1984, the union conducted strike votes among employees in the bargaining units. Although we have no direct evidence on point, we gather that all employees, whether union members or not, were permitted to participate in these votes, and that a majority of employees in each of the bargaining units approved strike action.

7. On November 30th, 1984, the union commenced strike action at all six stores where it held bargaining rights. The union's already relatively weak bargaining position was made more difficult by the fact that a sizeable number of employees either refused to support the strike at all, or struck for a few days and then returned to work. In order to seek to bolster its clout at the bargaining table, the union called upon consumers to boycott the company's stores. Neither the strike nor the boycott produced any change in the company's position. Shortly prior to the events described below, the leaders of two major religious groups spoke out in favour of the striking employees. According to Mr. Collins, this action gave some strength to the union, but, given the situation at the time, he felt the support had come too late to do much good. Indeed, it was Mr. Collins' view that it would take several more months of strike activity, coupled with the consumer boycott, to get the company to materially improve its outstanding collective agreement proposals.

8. On May 2nd and 3rd, 1985, union and company representatives met with mediators from the Ministry of Labour. Mr. Collins used these two days to "feel out" the company as to whether or not it was prepared to make any changes to its outstanding proposals. The impression he received was that the company was not prepared to make any major changes. Mr. Collins testified that at that point he and two other union representatives who had been involved in the negotiations met to consider the situation and what steps the union should take. According to Mr. Collins, there was a concern that some of the strikers were hurting financially. Also, some strikers were voicing concerns about losing their automatic right to return to work once the strike had lasted more than six months. Pursuant to section 73(1) of the Act, during the first six months of a lawful strike a striking employee can apply for and receive his job back. The actual wording of the section is as follows:



73.-(1) Where an employee engaging in a lawful strike makes an unconditional application in writing to his employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection (2), reinstate the employee in his former employment, on such terms as the employer and employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee by reason of his exercising or having exercised any rights under this Act.

9. Mr. Collins also testified that the union representatives were concerned that if the strike went on much longer, some of the employees who were not on strike might file applications to terminate the union's bargaining rights. Section 57 of the Act provides that if a trade union has not entered into a collective agreement within one year of its certification, an employee within the bargaining unit can apply to terminate the union's bargaining rights and attempt to demonstrate that the union no longer has the support of a majority of the employees in the bargaining unit. The one-year period within which a union is protected from a possible termination application is extended by section 61(3) of the Act if such an extension is necessary to allow the union to engage in strike activity for at least six months without a termination application becoming timely. Given the time considerations involved in this case, once the strike against the company had passed the six-month point, termination applications would have become timely.

10. In light of the factors discussed above, on Friday, May 3, 1985, Mr. Collins and the other two business representatives concluded that it would be appropriate to try to bring the strike to an end and get the strikers back to work. On Monday, May 6th, the three union representatives met with the approximately twenty-five employees on the union's bargaining committee to discuss the matter. At this meeting Mr. Collins indicated to the committee members that if the decision was reached to have the striking employees return to work, the matter of the collective agreements would have to be left in the hands of the union representatives. After a heated discussion, the committee voted in favour of getting the striking employees back to work. Later that same day, Mr. Collins advised the company through the mediators that the union was prepared to accept the company's last offer. Some discussion then ensued as to what time period the collective agreements were to cover. On the following day the company and the union reached agreement both as to the time period to be covered by the collective agreements as well as the contents of a "back to work agreement" that was to form part of each of the collective agreements. The back-to-work agreement dealt with issues relating to the recall to work of striking employees, the effect of the strike on vacation entitlements, when dues deductions were to be commenced, how dues were to be calculated for commission sales staff, a "no reprisal" clause providing that no action would be taken against employees for engaging or not engaging in the strike, and the setting of time limit for the company to notify the union as to certain "merchandise groupings" referred to in the proposed collective agreements.

11. On May 7, 1985, representatives of the company and the union entered into a number of memoranda of settlement, setting forth the terms for a number of collective agreements, one for each bargaining unit. Attached to each memorandum was a copy of the back-to-work agreement. Each memorandum contained the following paragraphs which clearly indicated that a condition precedent to the documents becoming formal collective agreements was that they be ratified by both parties:

2. The undersigned representatives of the parties do hereby agree to recommend complete acceptance of all the terms of this Memorandum by their respective principals.

3. The parties herein agree that the term of the collective agreement shall be one year effective from date of ratification.

12. Although no direct evidence was led on point, it appears that the appropriate officials of the company either expressly or by implication ratified the terms of the various memoranda of settlement. For the union, however, ratification created some difficulties. Generally, on the union side, ratification of a proposed collective agreement is done by way of a ratification vote among the employees who will be covered by the agreement. As discussed in the *George Magold* case, [1975] OLRB Rep. Oct. 758, the function of such a ratification vote is to test the acceptability of the proposed collective agreement among those who are to be governed by its terms and conditions. We believe we can take notice of the fact that from time to time proposed collective agreements are defeated in ratification votes by employees who are dissatisfied with the terms of settlement. When this occurs, the employer involved may make a new offer acceptable to the employees. If the employer does not make a new offer, generally the employees will either re-consider their decision and ratify the agreement, or commence strike action (or continue an existing strike) as a way of seeking to force the employer to improve its offer.

13. Although ratification votes among employees are common, the *Labour Relations Act* does not make them mandatory. A union is entitled to send to the bargaining table a negotiating committee with authority to enter into a collective agreement not subject to ratification. Further, there is nothing in the Act which precludes a proposed agreement from being ratified by some method other than a vote of employees. What the Act does do, however, is provide that *if* a ratification vote is held, it must be by secret ballot with all of the employees in the bargaining unit being entitled to vote. The relevant provisions of the Act are as follows:

72.-(5) All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

14. The union before us has a general practice of conducting ratification votes. The complainants and the union agree that given this general practice, union officials when describing the collective bargaining process prior to the commencement of the strike quite naturally referred to the holding of ratification votes. The actual agreement on point reads as follows:

During the (organizing) campaigns, union organizers from time to time in explaining the bargaining process to prospective members included in their remarks references to ratification votes.

In fact, the union, in the past has almost without exception conducted such votes and so its representatives may have naturally included it from time to time in describing the usual process.

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On November 18, 1984 the union conducted strike votes in the units. At each meeting and before the vote, the future of the bargaining process was described and reference was made to ratification votes. No "promises" of any kind were made in this regard on this nor on any other occasion in the future. For obvious reasons, the question of ratification was not an issue in the mind of union leaders in November, 1984.

15. The complainants filed with the Board two pieces of union campaign literature which made reference to ratification votes. The first, dated February 14, 1984, contained the following two references:

The initiation fee is one dollar when you sign the card and two hours pay per member per month, tax deductible and only after a collective agreement is voted on and accepted by you.

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Employers are required by law to bargain in good faith. Only you and your fellow workers have the right to vote on your collective agreement. It is as strong and as good as you make it.

The second piece of literature, dated April 9, 1984, repeated the second paragraph quoted above.

16. Although the union's general practice is to hold ratification votes, approximately three months into the strike the three union representatives became concerned as to whether such a vote would be appropriate. Mr. Collins indicated that the concern arose out of the possibility that non-striking employees might vote down a proposed collective agreement, and put the union in the situation where it had no collective agreement and no real chance of getting one. Mr. Collins also discussed the wisdom of holding a ratification vote with Mr. A. Heaps, the union's International President. The possibility that the union might not hold a ratification vote also occurred to a number of non-striking employees working at the Bramalea and Scarborough Town Centre stores. At the end of April or early May 1985, these employees presented the union with petitions requesting "that a ratification vote be held on any proposal before it is accepted by the union as a collective agreement". It appears that a majority of employees at the Bramalea and Scarborough Town Centre stores signed the petitions. With the exception of one employee who had been out for most of the strike and then returned to work, it also appears that those who signed the petitions either did not strike at all, or struck for fairly brief periods of time before returning to work. The petitions were one of the factors that led Mr. Collins to conclude that ratification votes would not be appropriate.

17. Over the two-day period of May 6th and 7th, the three union representatives consulted with each other, the union's Canadian director, the union's International President and with legal counsel on the question of how the proposed collective agreements should be ratified. As a result of these consultations, a decision was reached that the International President would decide whether or not to ratify the agreements. It was also decided to hold a series of "back to work" votes among the striking employees to ascertain whether or not they desired to return to work, and to convey the results of these votes to the International President to be used by him in deciding whether or not to ratify the agreements. In accordance with these decisions, the union representatives organized meetings of the striking employees, one meeting per store. The meetings with respect to the Bramalea and Scarborough Town Centre stores were held on May 10, 1985. Employees not on strike were not invited to the meetings. A number of non-strikers showed up at the meeting held with respect to the Bramalea store, but were turned away.

18. Mr. Collins testified that he advised the employees who attended the meetings on May 10th that tentative agreements had been reached and that the International President would



decide whether or not to ratify them. He also indicated that the President wanted to know if the striking employees desired to return to work. According to Mr. Collins, a number of questions were asked by employees relating to the proposed collective agreements, to which he replied that he was not in a position to discuss the agreements or their contents, because if he did, he would be turning the meeting into a ratification meeting. However, near the commencement of each of the meetings, Mr. Collins did advise the employees present that there was "nothing new" from mediation, and also that union officers did not expect that a better agreement was currently possible with the company. Given the history of this situation, we believe it likely that most employees present would have concluded that the tentative collective agreements were based on the offer earlier made by the company, and that they were familiar with at least the general outline of the offer. One document Mr. Collins did review at the meetings was the back to work agreement.

19. Near the conclusion of the meetings on May 10th, the striking employees were asked to vote on a bargaining unit basis as to whether or not they desired to return to work. The two choices on the ballot were "I wish to return to work at this time" and "I do not wish to return to work at this time". According to Mr. Collins, employees were not advised of the vote results at previous meetings because of a concern that this might influence their views. Mr. Collins testified that union officials were not certain as to how the vote might go, and indeed, he was of the view that a majority of those voting in at least some of the bargaining units would vote against returning to work. Mr. Collins indicated that his recommendation to the International President as to whether or not he should ratify the proposed agreements would depend on the number and size of the bargaining units where the strikers wanted to return to work as against those where they wanted to continue the strike. As it happened, a majority of striking employees in all of the bargaining units voted to return to work, a result which Mr. Collins stated surprised him. Mr. Collins telephoned the results of the votes to Mr. Heaps, the International President, along with a recommendation that the president ratify the proposed agreements. On May 11, 1985, Mr. Heaps forwarded to Mr. Collins a telegram which reads as follows:

Having regard to the information I have received, I hereby authorize Tom Collins to execute all of the collective agreements between the Retail, wholesale and Department Store Union and The T. Eaton Company. This telegram will constitute ratification of these agreements by the international union.

A copy of this telegram was delivered to the company on May 13, 1985. Later that same day, the company delivered to the union copies of formal collective agreements already executed on behalf of the company.

20. The complainants have raised a number of grounds in support of their claim that the union's conduct violated the Act. The company supports certain of these grounds. It is the position of both the complainants and the company that the Board should direct the taking of ratification votes in which all employees represented by the union are entitled to vote.

21. The company submits that only the employees represented by the union, and not the union's International President, were legally entitled to ratify the proposed collective agreements. This submission is based on the premise that the union's status is only that of an agent of the employees and accordingly the principals with the authority to ratify the memoranda must have been the employees. We do not agree. While it is true that when a union is certified to represent a unit of employees it becomes the "exclusive bargaining agent"

of the employees, it is more than simply an agent of the employees. Rather, so long as it continues to hold bargaining rights, it has a status independent of the employees and deals with the employer, and enters into collective agreements, in its own right. This point was expressed as follows in *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337, as follows:

18. Under *The Labour Relations Act* an employer makes his contract with the union and not with the employees. It is common to refer to a union as a "bargaining agent". A union is, however, much more than a mere agent when it comes to negotiating and administering a collective agreement. A union has an independent legal existence which the employer is bound to respect. This critical distinction was recognized by the Supreme Court of Canada in *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1. Here at p. 6, Laskin C.J.C. adopted the following language of Judson J. in *Syndicat Catholique des Employes the Magasins de Quebec, Inc. v. Compagnie Paquet Ltee* (1959), 18 D.L.R. (2d) 346 at 355;

The union contracts not as agent or mandatory but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.

19. By refusing to accept the union's execution of the collective agreement and insisting on a ratification vote among all of the employees the respondent has in fact refused to recognize the union as the body with the exclusive authority to make a collective agreement. By this failure to recognize the union the employer has violated the most fundamental aspect of its duty to bargain in good faith set out in section 14 [now 15] of the Act. (*De Vilbiss (Canada) Ltd.*, [1976] OLRB Rep. Mar. 49.)

22. The company and the complainants both contend that the constitution of the union does not permit the International President to ratify the terms of a proposed collective agreement. In this regard, they note that while the constitution is silent on the issue of whether the International President can ratify agreements, the following excerpt from Article XVIII of the constitution specifically refers to ratification votes:

**Section 2.** The right to bargain collectively for the whole membership of a local union shall lie with the executive board of the local union or officers designated by it and with the International Union or its representative when the local union so requests. The result of negotiations and the agreement shall be subject to ratification by the local union or by the members affected thereby.

**Section 3.** The International Executive Board shall guide and advise the course of negotiations by the local unions.

**Section 4.** If a majority of those voting ratify the results of the negotiations, the contract shall be drafted and signed by proper officers of the local union and thereupon it shall be binding upon all members. the International Secretary-Treasurer shall receive, upon request, copies of contracts from local unions.

23. It is not at all clear to us that in the circumstances present here the union's International President lacked the constitutional authority to ratify the memoranda of settlement. The sections of Article XVIII quoted above relate to negotiations conducted by a local union with respect to employees who are members of a local union. At The T. Eaton Company, however, the bargaining rights are held by the international union and not by a local. Further, although the constitution does not expressly empower the International President to ratify a collective agreement on behalf of the international, it does indicate that the President has wide powers to act on behalf of the international union, subject only to being reversed by the union's

Executive Board, General Council or convention. The following sections of Article VI of the constitution set out the International President's powers:

**Section 6.** The International President shall be the chief executive officer of the International Union and shall coordinate and administer the affairs of the Union in all of its phases, subject to the approval of the International Executive Board and/or the International General Council and the Convention. The President's decision shall be binding unless reversed by the Executive Board or General Council or Convention.

He shall act for the International Union between meetings of the International Executive Board and the International General Council and shall be a delegate to all conventions of the American Federation of Labor-Congress of Industrial Organizations or any subordinate body thereof and the conventions of all affiliates. He shall preside at all conventions of the International Union and at all meetings of the International Executive Board and International General Council. He shall, together with the International Secretary-Treasurer, sign all charters for affiliates.

Subject to the approval of the International Executive Board and/or the International General Council, he shall appoint directors, International Representatives and Organizers, and shall hire such other employees as may be necessary to conduct the affairs of the International Union, and shall fix their compensation.

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**Section 8.** He shall perform all such other duties as appertain to his office. For the faithful performance of his duties, he shall receive such annual salary payable weekly in equal amounts, as shall be determined from time to time by the International Executive Board. He shall be reimbursed for his expenses incurred while performing his duties as International President.

These provisions suggest to us that the International President has wide authority to act on behalf of the international union, including the authority to ratify proposed collective agreements to be entered into by the international union. Further, it is apparent that the International President, who is the chief executive officer of the union, interprets the constitution as giving him such authority. In these circumstances we are led to conclude that the International President did have authority under the union's constitution to ratify the various memoranda of agreement on behalf of the international union.

24. The company contends that pursuant to Article XIX of the union's constitution, the strike against the company could only have been brought to an end by a vote of all employees in the bargaining units. The article in question provides as follows:

**Section 1.** A strike may be called and terminated by a local union provided that the members within the unit affected, by a secret ballot, or the local executive board when authorized by the local union's constitution or by-laws have voted approval thereof. Determination shall be by a majority of those voting.

**Section 2.** The International President shall be kept informed of the settlement of any strikes. This article shall be applicable to joint councils, and divisions and other affiliates vested with authority to call or terminate strikes.

From the wording of this article, it is apparent that it relates to strikes called and terminated by a local union or some other internal division within the union. It does not, however, refer to strikes called by the international union itself. Given this fact, as well as the wide authority of the International President already referred to, we are of the view that the President likely did have authority to bring the strike to an end by ratifying the proposed collective agreements.



25. The complainants contend that the union's conduct in purporting to have the memoranda of settlement ratified by the International President was a breach of section 68 of the Act. Section 68 provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

26. The complainants contend that the union acted in bad faith, and thereby violated section 68, by denying employees an opportunity to participate in a ratification vote after advising employees during its organizing campaign and at the time of the strike vote that a ratification vote would be held. As noted above, although the parties agreed that the union did not actually promise employees that a ratification vote would be held, nevertheless, union officials when describing what they understood would happen indicated orally and in writing that a ratification vote would be held. It is not disputed that these comments were made in the good faith belief that ratification votes would be held. The only issue is whether the subsequent decision not to hold ratification votes demonstrated bad faith on the part of the union.

27. At the time that the union decided upon the method by which it would ratify the proposed collective agreements it was in a most unenviable situation. It was the view of Mr. Collins, who had responsibility for coordinating negotiations on behalf of the union, that the company was not likely to make a better offer unless the strike and associated consumer boycott continued for an extended period of time. However, striking employees faced the real possibility that they might lose their jobs if the strike continued much longer. Although at the time the striking employees had not yet been asked if they desired to return to work, from Mr. Collins' evidence it is clear that he suspected that many of them did not wish the strike to continue. In addition, unless collective agreements were entered into fairly quickly it was quite possible that employees who did not support the union might file termination applications. On top of all of this, the union was concerned that if it held ratification votes, non-striking employees might vote down the proposed agreements and put the union in a situation where it had no agreements and no chance of getting any. The *Labour Relations Act* contemplates that the result of collective bargaining will be a collective agreement. The purpose of a ratification vote is to allow employees to indicate whether certain proposed terms for a collective agreement are acceptable to them as opposed to possible other terms. The union felt that if ratification votes were held in this case, and the proposed agreements defeated, its bargaining rights would be effectively destroyed. The Act, however, stipulates that votes to terminate a union's bargaining rights are to be conducted in response to proper and timely termination applications. They are not to be conducted in the guise of ratification votes. Given these considerations, we do not believe that the union acted in bad faith when it decided not to follow the normal ratification procedures that had previously been described to employees. The reality of the matter was that this was not a normal situation.

28. The complainants contend that the union violated its duty of fair representation by acting in a hostile fashion towards non-striking employees. In support of this claim, they rely on the fact that the union declined to hold formal ratification votes because it was concerned that non-strikers would be permitted to cast ballots in such a vote. They also point to the

fact that non-strikers were excluded from the meetings where strikers were asked to indicate whether or not they desired to return to work. We do not agree that the union acted in a hostile fashion towards the non-striking employees. The union was not under any legal obligation to hold ratification votes. Further, given the union's concern that any such votes would have the potential to destroy its bargaining rights, in our view the union's refusal to conduct such votes falls far short of demonstrating any unlawful hostility on its part. We also do not view the union's refusal to allow non-strikers to participate in meetings where striking employees were asked to signify whether or not they wanted to return to work, as indicative of bad faith on the part of the union. The union wanted to ascertain whether the striking employees desired to return to work. It was a logical time to survey the striking employees in that the six-month period during which they had an automatic right to return to work was drawing to an end. It would have made no sense at all for the union to ask employees who were not on strike if they desired to return to work. In our view, the union's action in denying the non-strikers an opportunity to participate in the back-to-work votes did not reflect any ill will on the part of the union towards the non-strikers, but rather a desire to ascertain whether those who would have to bear the financial costs and possible loss of their jobs if the strike were to continue, desired return to work.

29. With respect to the back to work votes, the complainants allege they violated subsections (5) and (6) of section 72. These provisions stipulate that all employees in a bargaining unit are entitled to participate in a strike vote or a vote to ratify a proposed collective agreement, and that those entitled to vote are to have ample opportunity to cast their ballots. The complainants allege that the back to work votes violated section 72 because the votes were "strike votes", and non-striking employees were not given an opportunity to participate in the votes. It will be recalled that on November 18, 1984, prior to the commencement of the strike, the union conducted strike votes in which all employees were permitted to participate. The complainants, however, contend that the back to work votes were also strike votes in that they dealt with the issue of whether the ongoing strike should be continued. We do not agree. The term "strike vote" is generally used to refer to a vote among employees in a bargaining unit as to whether the union should commence strike action or a vote as to whether or not the union's negotiating committee should be authorized to call a strike in the future should the committee deem it necessary. The term is not generally used to refer to votes related to the issue of whether employees currently on strike desire to return to work. If we were to conclude that a vote on the issue of whether employees currently on strike desire to return to work is a "strike vote" within the meaning of section 72, it would accord to non-striking employees a say as to the fate of employees actually on strike. Non-striking employees might tip the balance in favour of having others continue strike action, even though they themselves would not have to bear any of the personal consequences of the strike. In some situations, employees hired as strike replacements might vote in favour of continuing a strike solely out of a desire to keep working at the expense of long-term employees who are out on strike. In our view, if the Legislature had intended these types of results, it would have so provided in more express language than that found in section 72. Taking all of these considerations into account, we are of the view that the back to work votes were not "strike votes" within the meaning of section 72, and, consequently, the failure to let non-striking employees participate in these votes was not a violation of section 72.

30. The complainants further contend that the back to work votes were "ratification votes" within the meaning of section 72 and since the non-striking employees were not permitted to vote, section 72 was violated. The complainants acknowledge that the votes were

described as back-to-work votes, but contend that in reality they were ratification votes. In this regard, the complainants note that the striking employees would reasonably have been able to deduce the terms of the proposed agreements and that the strikers had been advised of the terms of the back-to-work agreement, which was to form part of the collective agreements. The complainants contend that although formal ratification was to be by the International President, the President was likely to follow the results of the vote, and accordingly, in reality, the ratification was accomplished by a vote of some, but not all, of the employees. We do not agree. It is clear that the final decision as to whether to ratify the proposed agreements was left to the International President. Doubtless in deciding what course to follow, the President would take into account the views of the striking employees as to whether or not they desired to return to work. He would already have been aware of the views of the non-striking employees in this regard. If the vote result had been as Mr. Collins projected, namely, with the strikers in some of the bargaining units indicating a desire to return to work and strikers in other units indicating that they desired to continue the strike, it is not at all clear what decision the International President would have made. Given the realities of the situation, it is doubtful that the President would have ratified some of the proposed agreements and permitted the strike to continue with respect to only certain of the bargaining units. More likely, he would have decided to ratify all or none of the proposed agreements. In all of the circumstances, we are satisfied that ratification the back-to-work votes involved only a polling of the striking employees as to whether or not they desired to return to work and were not ratification votes such as to bring into play section 72 of the Act.

31. The final aspect of the complaints relate to the alleged breach of section 80(2) of the Act on the part of the union. Section 80(2) provides as follows:

No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

32. Mr. Collins indicated that one of the reasons why the union decided to accept the company's offer and not hold ratification votes was a concern that employees who did not support the union might file termination applications once the strike had gone on longer than six months. The complainants contend that the union's decision not to hold ratification votes was a form of discrimination against them, and a penalty imposed on them, so as to avoid the possibility that they would file termination applications, and as such amounted to a violation of section 80(2). We do not, however, view the union's conduct as involving a violation of section 80(2). While a union cannot discriminate against or seek to punish employees because of a belief that they might file a termination application, we do not view it as improper or unlawful for a union to seek to order its affairs so as to take advantage of the provisions of the Act relating to when termination applications can be filed. In this regard we would refer to the *Beatrice Foods (Ontario) Limited* case, [1982] OLRB Rep. April 519, where in a somewhat different fact situation, the Board commented:



There is nothing unlawful in a trade union using normal vigilance and alert planning to preserve and protect its bargaining rights; in our view the timing of a ratification or a strike vote to coincide with the approaching anniversary of certification is a reasonable business practice predicated on the scheme of the Act. We do not see how a union can be faulted for exercising prudence in the timing of its affairs in a way that maximizes its own interests.

We would note that the union has not and cannot remove the right of employees, if they so desire, to raise the issue of whether the union should continue as their bargaining agent. What has happened is that in accordance with the terms of the Act, the possibility of this occurring has been postponed until the last two months of the collective agreements now in operation.

33. The complainants have failed to demonstrate any breach of the Act on the part of the respondent trade union. These complaints are hereby dismissed.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. I have had the opportunity of reading the decision of my colleagues, and I must respectfully disagree with their findings. The evidence persuades me that the respondent union acted with ill-will in deliberately excluding the complainants from participating in a ratification vote.

2. We heard testimony from Thomas Collins, who is an International Representative of the union, and who co-ordinated the bargaining at the stores in question. In the fifth month of an unsuccessful strike, he stated that the union had concerns about:

(a) the effect of the long strike on the strikers - "they were hurting.";

(b) the fact that the strikers would lose their right to their jobs if the strike went past six months; and

(c) the fact that "strike-breakers" could apply for a de-certification if the strike went past six months.

When cross-examined on these concerns, Mr. Collins had to admit that if the strikers went to work without concluding a collective agreement, then the only concern remaining would be the de-certification of the union. If there was a successful application for de-certification it would be a severe blow to his union and an embarrassment to the efforts of the trade union movement to organize the employees of department stores.

3. Mr. Collins was also alarmed by various petitions that he had received wherein employees at the stores were asking to be allowed to vote on any contract reached with the employer. Apparently, less than 1/3 of the employees at the stores were still on strike at the time. "The large number of employees alarmed me. We felt it was being engineered by the employer." Mr. Collins had to admit that he had no direct evidence to back up his feelings, and counsel for the union agreed that there was "no bonfire" ie. the union was making no allegations about unlawful activity by the company.

4. Mr. Collins decided to call the meetings of the striking employees. He realized that

there was a possibility that "some units would vote against returning to work." He prepared a hand-printed agenda for the conduct of the meetings. It reads as follows:

RETURN TO WORK PRESENTATION - EATONS.

(1) DIFFICULT DECISION. - NOT A RATIFICATION MEETING.

(2) WHY? LAW (1) RECALL

(2) DECERTIFICATION

(3) SCABS VOTE

(3) MEDIATION - NOTHING NEW

(4) INTERNATIONAL PRESIDENT HAS ASKED ME TO:

(a) FIND OUT IF YOU WANT TO RETURN

(b) REPORT TO HIM

(c) HE WILL DECIDE WHETHER TO RATIFY

(CONSTITUTIONAL AUTHORITY)

(5) RETURN TO WORK DOCUMENT

(6) VOTE - BALLOTT (sic) BY CERTIFICATE.

(7) RESULTS - HAVE THEM SIGN BACK TO WORK FORMS.

Mr. Collins testified that the reference to "SCABS VOTE" referred to potential de-certification proceedings by the employees in the units who were working.

5. Mr. Collins stated that it was possible that some of the striking units would vote against returning to work, but that he had not considered how to advise the International Union president if that should happen. In any event, all of the striking units agreed to go back to work and subsequently the International President ratified the collective agreements for all the stores. This was the first time that this union procedure had ever taken place in Ontario.

6. Mr. Collins testified that "if a unit voted against returning, then I would report to the President with my recommendation and he would have to decide what to do", but that he had not made up his mind what to recommend. Contrasted with that evidence is his earlier statement that "I expected the strike would go on for a long time if the employees refused to return to work."

7. From that evidence I can only conclude that the union took a ratification vote under the guise of asking the strikers if they wanted to return to work. Further, there was a deliberate attempt to exclude the Complainants from participating in the vote because they had abandoned or refused to participate in the strike and were working. The ill-will against the working employees is demonstrated by the use of the term "SCABS VOTE" in Mr. Collins' notes. In some situations, I suppose, the term "scab" can be used in a descriptive sense, but at the end of a 5 month strike and in these circumstances, it can only have a perjorative meaning.

It is akin to the use of the word “trouble-maker” by management during a union organizing campaign which allows this experienced tribunal to infer anti-union animus on the part of the employer.

8. I would find that the union has violated s.72(5) and s.68 of the Act by its actions of deliberately excluding the complainants from participating in a ratification vote. If there is going to be a ratification vote, then there is a duty imposed on a union to allow all employees in the bargaining unit to participate.

9. We have been asked to void the contracts as part of the remedy if we find a violation of the Act. But there is no duty or obligation on a union to hold a ratification vote nor is a union bound by the results of a ratification vote. *K-Mart Distribution Centre* [1981] OLRB Rep. Oct. 1421. *Inter-Bake Foods Ltd.* [1981] OLRB Rep. Aug. 1145. And I believe that even if a properly conducted vote had turned down the contracts the union International President would have ratified them. Nor are there any allegations that the union acted unfairly in representing the interests of all the bargaining unit employees vis-a-vis the employer. It would appear that all unionized employees were treated at least the same as the non-union employees of the company.

10. The issue of whether the International Union President had authority to ratify the contracts is one to be pursued in other forums or proceedings. That may not be a satisfactory result to the Complainants who quite rightly believed that they were “the You in Union”, but that is the net result of the legal authorities which give the union independent status in concluding contracts on behalf of bargaining units. It is a “bargaining agent” only in name, a fact that is little understood by employees when they are asked to join a union.

11. I would order the union to sign and mail to each employee in the units a notice in the Board’s usual form stating that it had violated the Act by not allowing the Complainants to participate in a ratification vote.

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**0464-84-R** The Canadian Union of Public Employees, Applicant, v. The Association of Community Centres of the City of Toronto, the **City of Toronto**, Cecil Street Community Centre, Central Eglinton Community Centre, Cowan Avenue Firehall, Scadding Court Community Centre, Ralph Thorton Community Centre, The 519 Church Street Community Centre, Community Centre 55, and Applegrove Community Complex, Respondents

**Bargaining Unit - Employer - Whether employees in community centres employees of City or of each centre - City only legal entity capable of employer status under Act - City found to be employer without need to apply usual criteria to determine employer - Each centre within Metro Toronto having considerable autonomy - Board applying *Usarco* test - Determining separate units appropriate as exception to municipal-wide unit policy**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

**APPEARANCES:** *Ian Roland*, *Kevin Whitaker* and *Helen O'Regan* for the applicant; *David Leibson* for the City of Toronto; *J. C. Murray* for the eight community centres.

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER I. M. STAMP;** August 15, 1985

1. This is an application for certification in which the applicant, the Canadian Union of Public Employees ("CUPE") is seeking to be certified as the exclusive bargaining agent for the employees in eight community recreation centres operating within the City of Toronto.

2. The application as originally filed named as respondent the Association of Community Centres of the City of Toronto. It came for hearing before the Board differently constituted. As a result of issues identified during the hearing and for reasons set out in the Board's decision following the hearing, the Board added as respondents to the application the City of Toronto and the eight community recreation centres. The Board also directed that a new terminal date and a new hearing date be set for the application and that notices of the application and of the hearing into it be sent to each of the additional respondents together with new notices to the employees to be posted at each centre along with a copy of the Board's decision setting out the issues raised by the application. The Board's decision identified three particular, interrelated issues:

(1) whether employees working at the community centres are employees of the individual community centres, the City of Toronto, or The Association of Community Centres of the City of Toronto;

(2) if the employees are employed by the individual community centres, is this an appropriate case for the Board to apply section 1(4) of the Act and treat the community centres as well as the City of Toronto as one employer; and,

(3) whether there should be a single bargaining unit covering

employees at all of the community centres or eight bargaining units, one at each centre.

3. When the application came back on for hearing before the Board as constituted herein, the parties were agreed that the Board should deal with all three issues, but decide first the question of who is the employer of the employees affected by the application because a finding that the employer was the City of Toronto would render redundant the issue with respect to section 1(4) of the Act. The applicant takes the position that the City is the actual employer of the employees while the City and the eight community recreation centres take the position that each centre is the employer of the persons employed at the centre. The parties were disagreed whether a decision that the City was the employer would dispose of the bargaining unit issue; that is, whether there should be one or eight appropriate bargaining units. CUPE takes the position that there should be one unit and the other parties take the opposite position.

4. Some of the evidence heard by the Board is relevant to more than a single issue, therefore, the Board has not attempted to segregate the facts by issue. While certain of the facts herein were asserted by one or other of the parties and either specifically agreed to or not disputed, the majority of the facts are based on the Board's assessment of the evidence of the persons who testified in the proceedings. The Board heard the testimony of Morley Bregman, Director of Planning and Budgets in the City's Management Services Department, Deborah McGovern, a senior job evaluation officer in the Management Services Department, Mary Kainer, Executive Director of Scadding Court Community Centre, Roger Hollander, Executive Director of The 519 Church Street Community Centre and Charlene Sheard, Program Co-ordinator at Central Eglinton Community Centre. Sheard testified on behalf of CUPE. Hollander and Kainer testified on behalf of the eight community recreation centres and McGovern and Bregman testified on behalf of the City.

5. Each of the eight centres has been created by a by-law enacted by the Council of The Corporation of the City of Toronto pursuant to either the *Municipal Act* R.S.O. 1970, c. 302 or the *Community Recreation Centres Act* R.S.O. 1974, c. 80. The by-laws respecting Scadding Court Community Centre ("Scadding Court") and Applegrove Community Complex ("Applegrove") were the only ones amongst the eight by-laws which were enacted pursuant to the *Community Recreation Centres Act* ("the CRC Act"). These statutes also give Council discretionary authority to appoint a board of management (*Municipal Act*) or a committee of management (the *CRC Act*). The City has used this authority to appoint a committee of management at each of Scadding Court and Applegrove and a board of management at each of the six other centres. For ease of reference in this decision, the term "board of management" will be used to refer to either situation except where the context requires otherwise. Neither statute operates to make a board of management established by a municipality pursuant to the statute a corporate entity separate from the municipality which created it. The by-law governing each centre establishes the number of persons who are to be on the board of management and provides for their appointment by Council. The numbers on the boards differ from centre to centre, but generally Council appoints the two aldermen for the area served by the centre plus other persons who are nominated by the membership of the centre. In the case of Scadding Court, there are four persons who are appointed by Council without nomination from the centre. The two enabling statutes and the by-laws creating each centre make it clear that the appointments are at the pleasure of Council, although generally for a specific term. There is evidence before this Board that Council has removed and replaced an entire board of management in circumstances where it deemed that action to be necessary.

6. The centres have two major sources of funds for their operation: the City and various governmental and non-governmental granting agencies. Some centres also receive funds in the form of user fees and from the proceeds of other community fund raising activities. Those two major sources of funds are reflected in the budgets by which the centres plan and manage their financing. Each centre has a core administration budget and a program budget, also referred to as a self-sustaining budget. The core administration budget is financed by the City and the program budget is financed by funds from all of the other sources. Separate accounting records, including bank accounts are maintained for core administration funds and for program funds at each centre.

7. Each centre is required to present a budget annually to the City setting out its requirements for core administration funds for the forthcoming year. These budgets must conform with and go through the same review and approval procedures that the budgets of operating departments of the City are subjected to. Final approval comes from Council. Once Council has given that approval, the funds are advanced monthly to the centres and become their funds kept in bank accounts in the name of each centre, the signing authority for which is designated by the centre's board of management. The centres are free to spend that money without any further approval for the purposes for which it was approved in the budget. These funds cover such expenses as the salaries, statutory and voluntary benefits for full-time core administration employees, salary and statutory benefits for part-time core administration employees, supplies used in the operation of the centres and, if the centre's arrangements with the City includes having the centre pay for the utilities and physical maintenance of its premises, these expenses also would be covered by the core administration budget.

8. The program budget deals with all funds from sources other than the City. These funds are used to meet the expenses associated with the programs provided by each centre to its community. These expenses include such things as the salaries, statutory and voluntary benefits of employees who put on the programs provided by the centre. Subject to any accounting of the use of the funds which the centre may have to make to the granting agency, the spending of these funds is at its discretion and are not funds for which the centre must account to the City. The program budget is prepared according to the centre's requirements and does not go through any review and approval process by the City. A copy of the budget is provided to the City for information purposes. Scadding Court has exercised its discretion respecting the spending of these funds to, for example, supplement the salary of a part-time core administration employee. The 519 Church Community Centre ("519 Church") uses funds from its program budget to provide voluntary benefits to the part-time core administration staff because the core administration budget contains no provision for this purpose.

9. The proportion of a centre's total funds represented by the funds in the core administration budget varies widely from centre to centre. The core administration funds might represent most of the funds for a small centre, but for Scadding Court they represent approximately fifty-five per cent of its 1984 funding and for 519 Church, the core administration funds are approximately seventy-five per cent of its total spending. The proportion of total expenditures represented by the core administration and program budgets is not reflected in the number of employees in core administration jobs compared with those in program jobs. Program jobs are predominately either part-time or seasonal part-time and full-time jobs and, as a result, a larger number of employees are employed in program jobs than core jobs. For example, Scadding Court has nine core administration employees in a total complement which



fluctuates between 30 and 45 employees. 519 Church Street has six full-time core administration employees and four to six part-time. Its program staff fluctuates between a minimum of six and a maximum of twenty employees.

10. The by-laws under which the eight centres operate serve three objects:

- (1) define the premises which are to be used and establish those premises as a community centre (the *Municipal Act*) or a community recreation centre (the *CRC Act*);
- (2) establish a committee or board of management "... to manage and control the Premises as a community recreation Centre under the [CRC] Act ..." or, pursuant to the *Municipal Act*, "... to maintain, manage and operate the Premises on behalf of the Council, as a community centre."; and,
- (3) define the broad conditions under which the committees or board's of management will operate the premises as community recreation centres or community centres.

The City remains owner of the property and premises or holds the premises as lessee where it is not the owner. Item 3 above refers to the conditions under which the property and premises will be operated by a centre's board of management. The particular conditions vary from by-law to by-law, but there are certain ones which are common to all eight by-laws. These are:

- (1) sole responsibility for the custodial care of the premises and for providing the management and supervision required to assure that the premises are used in a fit, orderly and lawful manner as a community centre or community recreation centre;
- (2) manage and operate the premises efficiently in accordance with standard good business practices;
- (3) keep proper records of board of management meetings and provide a copy to the Commissioner of City Property;
- (4) adopt and maintain banking arrangements and ordinary good accounting practices that are acceptable to the City Auditor and keep such books of account and submit such statements from time to time as the City Auditor may require;
- (5) provide at all reasonable times access by the City Auditor to all books of accounts and records for inspection or audit purposes;
- (6) maintain at all times and at the sole expense of the board of management a public liability and property damage indemnity policy for the premises satisfactory to the City Treasurer and deposited with him; and
- (7) provide annually to the City Treasurer financial statements audited by the City Auditor and covering the maintenance, management and operation of the premises.

11. Each centre has its own catchment area or neighbourhood to serve. The by-laws for some of the centres define the geographic limits of these areas and in other cases the by-laws are silent. Sometimes there will be overlap of the areas served by some of the centres. The services which a centre will provide to its area is determined by its board of management based on what the board perceives to be the community's needs. Subject to the limits imposed by the premises and by the centre's program funds, the board has full discretion to decide what programs, activities and services will be provided by the centre. In this respect, the board's do all of the following either directly or by delegation to the staff of the centre:

- (1) determine what manpower is required and how it will be organized to deliver the services, including the design of the jobs and the qualifications required to perform them;
- (2) locate, select and hire the persons to fill the jobs;
- (3) determine the rates of pay, benefits and other working conditions of employees;
- (4) provide training as needed;
- (5) discipline employees, including discharge;
- (6) pay employees on cheques of the centre drawn on its bank account; and,
- (7) make the statutory deductions and remittances for income tax, unemployment insurance and Canada Pension Plan, all in the name of the centre.

12. Those functions apply equally to core administration staff and program staff, although the extent of discretion exercised by the centres with respect to core administration staff is modified to a certain extent by the terms under which the City provides funds to the centres for the salary and benefit expenses of the core administration staff. The core administration jobs in each centre were graded in a job audit by application of one of the job evaluation programs which the City uses to grade the jobs of some of the employees represented by CUPE. Those centres which agreed to pay core administration staff according to the City's salary scales applicable to the job grades assigned were assured of funding for the salary expenses of core administration employees according to those salary scales. These are the salary scales which govern the pay of City employees in jobs represented by CUPE. As a result of this arrangement, the centres which have adopted the job grades and salary scales use those scales in making their requests through the budget review procedure for funds to meet the salary expenses for core administration employees. This also qualifies the centre for funds to meet the expenses of providing benefits to the core administration employees. Full-time core administration employees receive the same benefits as the City provides for employees in similar jobs under one of its collective agreements with CUPE. For part-time core administration employees, the centres receive funding only for benefits such as unemployment insurance, Canada Pension Plan, vacation and holiday pay which are mandated by statute. Unless the centres are prepared to make funds available from sources other than the core administration budget, the rates of pay and level of benefits which they provide for core administration employees are limited to those levels set out in their approved budgets. There are two examples in evidence where the centres have supplemented pay or benefits from other funds. Scadding Court has chosen to supplement the salary expense of a part-time core administration employee so as to provide full-time employment for that person. 519 Church Street provides benefits to part-time core administration employees beyond the statutory benefits and does so out of its program funds.

13. The evidence with respect to the Association of Community Centres of the City of

Toronto is that it is an *ad hoc* association of the eight centres formed initially to share information with respect to the manner in which the centres were funded by the city and to help co-ordinate the relationships between the centres and City Council and its committees. The Association has not functioned in any way to seek to bring about a standardization of the pay and benefits for part-time core administration employees or for the program employees at the various centres.

14. Some of the centres have been recently formed and others have been in operation for ten years or more. During all of this time CUPE has had collective bargaining relationships with the City respecting its employees but, prior to the making of this application, CUPE had not attempted to assert any bargaining rights with respect to the employees of the eight centres.

15. While there is *viva voce* evidence that the members of Scadding Court have incorporated a not-for-profit corporation, Scadding Court Community Centre Inc., there is no evidence that the members of any of the other centres have established corporations. It appears that the only activities carried on with respect to the Scadding Court Corporation is that its members annually elect twelve directors of the corporation for the sole purpose of putting forward the names of those persons as members of the board of management to be appointed by City Council. There are sixteen members on the Scadding Court board of management. The Scadding Court Corporation does not maintain separate books and, except for the election of its directors, the only other function which it serves is to use its seal and name for issuing receipts for program funds. The centres have registered themselves with Revenue Canada as charitable organizations and as such issue receipts in their own name for donations received for their programs.

16. After all of the evidence had been heard, applicant counsel advised the Board and the parties that the applicant was satisfied that the Association was not the employer of the employees whom the applicant was seeking to represent. Thus, the first question becomes one of whether the City or each of the eight centres is the employer of the employees affected by this application.

17. Applicant counsel urges the Board to answer that question by deciding the narrow, legal issue of what sort of entity was created by the by-laws which established them pursuant to either the *Municipal Act* or the *CRC Act*. That was the same question, according to counsel, which confronted the Board in its decision in *Corporation of the Town of Meaford*, [1980] OLRB Rep. May 667. There was an issue in that application for certification of whether the *Corporation of the Town of Meaford* was the employer of certain employees working at a cemetery and at a community centre both located within the Town of Meaford. With respect to the cemetery employees, the Board found the Board of Park Management of the Town of Meaford, which had been established pursuant to the provisions of *The Public Parks Act* to manage the cemetery, to be an employer independent of the Town of Meaford and the employer of the cemetery employees on the basis of certain provisions of *The Public Parks Act*. These were:

- (1) The Board, pursuant to section 4 of that Act, was deemed to be a corporation;
- (2) the Act authorized the Board to employ all necessary clerks, agents and servants;



(3) the Act gave the Board discretion to prescribe the duties and compensation of employees; and,

(4) the Act provided provision for officers and employees of the Board to become employees of the Town of Meaford if the Board ceases to exist.

The Board found that the *Corporation of the Town of Meaford*, however, was the employer of the community centre employees and its reasons are given in paragraphs 3 and 4 of the decision set out hereunder:

3. The Meaford and St. Vincent Community Centre is operated by the Committee of Management of the Meaford and St. Vincent Community Centre. The relevant statute here is *The Community Recreation Centres Act* which empowers a municipality to appoint a committee for the management and control of a community centre. The Act contemplates that actual ownership of the centre will remain with the municipality. The Act does not deem a committee of management to be a corporation, nor does it refer to such a committee as having employees of its own. A reading of the Act as a whole satisfies us that the purpose of a committee of management is simply to manage the day-to-day affairs of a community centre on behalf of a municipality, and that such a committee has no separate legal status as an employer separate and apart from the municipality which creates it.

4. The evidence indicates that the Town of Meaford treats the Committee of Management of the Community Centre in much the same way as it does the Board of Park Management. According to Mr. Floto, the Meaford Town Clerk, the Committee alone is responsible for hiring employees and for setting their conditions of employment. To our mind, this situation reflects only the fact that the Town has seen fit to give the committee a wide degree of discretion which, by itself, cannot have the effect of creating the Committee as a separate employer in its own right.

18. As the Board understands applicant counsel's argument, he contends that the Board in *Meaford* decided the question of who was the employer by deciding the narrow legal issue of what kind of entities had been created when the Corporation of the Town of Meaford established the Board of Parks Management pursuant to the *Public Parks Act* and the Committee of Management of the Community Centre under the *CRC Act*. That same legal issue confronts the Board in the instant case according to counsel, and even one of the enabling statutes, the *CRC Act*, is the same as one of the statutes considered in the *Meaford* decision, *supra*. Counsel contends that the same factual basis exists in the instant case. Therefore, the Board should decide this case on the same basis as the *Meaford* case was decided; in other words, by deciding what kind of entity was created when the City passed by-laws under the *Municipal Act* and the *CRC Act* establishing each centre and its board of management.

19. Counsel for the respondents disagree. They argued that the instant case is readily distinguishable from *Meaford* because it is clear from the decision that the Board did not have the kind of evidence before it which has been adduced in the instant case. They argue further that, when the evidence of the board of management's scope of authority is related to the factors by which this Board has usually decided which of two or more entities is the employer, it will establish that the boards control all of the incidents of employment. Counsel for the City, in light of such strong evidence, contends that were this Board to decide the case on the basis proposed by applicant counsel, it would be abandoning the criteria for determining who is the employer followed by the Board in *York Condominium Corporation*, [1977] OLRB

Rep. Oct. 645 and in subsequent decisions, like *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538.

20. The *York Condominium* decision pulled together the variety of criteria which the Board had developed over many years to guide it when deciding which entity amongst two or more was the employer of employees whom a trade union was seeking to represent. The manner in which the Board has applied these criteria was later analysed in substantial detail in the Board's decision in *Sutton Place*, *supra*. There were seven such criteria and, as the Board observed in *Sutton Place*, no relative priority as to weight has been assigned to them. Rather, the Board has decided which of two or more entities was the employer based on the preponderance of the evidence before it respecting all seven criteria and after considering how the particular facts apply to those criteria. The criteria are set out at paragraph 26 of the *Sutton Place* decision as follows:

(1) The party exercising direction and control over the employees performing the work. - See the *Municipality of Metropolitan Toronto* case, 61 CLLC 16,214; the *Sentry Department Stores Limited* case, [1968] OLRB Rep. Sept. 540, 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. May 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. June 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. July 753, 761.

(2) The party bearing the burden of remuneration. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. Oct. 487, 488; the *KelTruck Services Ltd.* case, 1972 CLLC 16,068; and the *Templet Services* case, [1974] OLRB Rep. Sept. 606, 608.

(3) The party imposing discipline. - See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.

(4) The party hiring the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.

(5) The party with the authority to dismiss the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.

(6) The party which is perceived to be the employer by the employees. - See the *Sentry Department Stores Limited* case, *supra*.

(7) The existence of an intention to create the relationship of employer and employees. - See the *Belcourt Construction (Ottawa) Limited* case, *supra*.

21. Counsel for the respondents are likely correct when they say that the Board would be in peril of abandoning these criteria if it does not apply them when deciding which one of two or more legal entities is the employer. A review of those two decisions and the other

ones to which they make reference makes it clear, however, that the criteria have been applied to a legal entity in the form of a corporation, person, partnership, either corporate or personal, or some other legal form specifically created by statute. One example of this latter type of legal entity is found in *Meaford, supra*, with respect to the Board of Park Management which was deemed to be a corporation pursuant to the *Public Parks Act* under which it was established. Another example is the Province of Ontario Board of Internal Economy, the respondent in the Board's decision *Province of Ontario Board of Internal Economy*, [1980] OLRB Rep. Jan. 88. The legal status of the Board of Internal Economy is described in the following terms at paragraph 3:

.... The evidence establishes that the respondent Board of Internal Economy is a governing body of the Office of the Legislative Assembly, which in turn is the administrative office of the Government of Ontario, including such things as the Office of the Clerk, the Office of the Speaker, the Hansard Reporting Service, and personnel and finance administration. Reference may be made to *The Legislative Assembly Act*, R.S.O. 1970, c. 240, particularly sections 71-86. The Office of the Legislative Assembly implements the decisions of the Board of Internal Economy. The Board is composed of Members of the Legislature with the Speaker as chairman, and acts as the representative of the Members and transmits their wishes into actions.

It is one of the decisions discussed in *Sutton Place, supra*.

22. The significance under the Act of identifying the legal entity which is the employer was commented on by the Board in *Beatrice Foods (Ontario) Limited*, [1982] OLRB Rep. June 815. The Board in an earlier decision, had directed the taking of a representation vote in a unit described in terms of "all employees of the respondent at its Model Dairy Division" having first substituted "Beatrice Foods (Ontario) Limited" for "Model Dairy (Division of Beatrice Foods)" as the name of the respondent in the style of cause of the application. The Board received a request from the respondent to reconsider and amend its decision to show as the respondent (employer) "Beatrice Foods Ontario Limited, Model Dairy Division". The Board's decision denying the request was preceded by these comments at paragraph 3:

..., the Board is of the view that it would not be appropriate to amend the style of cause in the manner requested by the respondent. While a corporation may be subdivided into a number of divisions for operational, marketing and other purposes, the creation of such internal divisions does not change the fact that the legal entity which is the employer remains the corporation itself, which must have "Limited", "Incorporated", "Corporation", "Ltd.", "Inc." or "Corp." as the last word in its name (see *Business Corporations Act*, R.S.O. 1980, c. 54, s. 8, and *Canada Corporations Act*, R.S.C. 1970, c. C-32, s. 25). To forestall various difficulties that might otherwise arise with respect to such matters as enforcement of Board decisions and others, it is preferable (although it has not, to date, been the Board's unvarying practice) to include only the corporate name of an (incorporated) employer in the style of cause of an application or complaint. If, as in the present case, it is appropriate to restrict the applicant's bargaining rights to employees who work in a particular division that has been established by their corporate employer, this can be accomplished by referring to that division in the description of the bargaining unit, as was done in the aforementioned decision dated May 31, 1982 in which the unit was described as 'all employees of the respondent in its *Model Dairy Division* at Sault Ste. Marie...' (emphasis added).

23. The Board's decision in *Sutton Place* is an example of the admission in those comments that it has not been the Board's unvarying practice to use only the corporate name of an incorporated employer in the style of cause of an application or complaint. The style of cause of the decision names Dennis Management Company, a Division of Affiliated Realty Corporation as one of the respondents. The correct style according to *Beatrice Foods, supra*,



would have been simply Affiliated Realty Corporation. What is clear about that decision, however, and this is made clear by paragraphs 4 and 6, the Board was applying the *York Condominium* criteria to decide which of two corporations was the employer: Affiliated Realty Corporation or an apparent partnership of two corporations, York Steel Construction Limited and Affiliated Realty Corporation, even though the presenting issue was which of Dennis Management Company or Sutton Place Hotel was the employer. Dennis Management was an unincorporated operating division of Affiliated Realty Corporation. Sutton Place Hotel was a joint venture of York Steel Construction Limited and Affiliated Realty Corporation.

24. The *Municipal Act* and the *CRC Act* permit municipalities to establish boards or committees of management. Neither Act requires a municipality to establish a board or committee for the purpose of operating a community centre or community recreation centre when a centre is established under either Act. It is in the discretion of the municipality whether it will do so. Nor is there any language in either statute which would make a board or committee established under them a corporation or deem it to be a corporation. Therefore, none of the boards or committees of management of the eight centres is a corporation or deemed to be a corporation under the statutes which enables the City to establish them. The members of Scadding Court, on the evidence before the Board, ostensibly are incorporated under the *Corporation Act*, R.S.O. 1980, c. 95. If there is a corporation, clearly it is not that corporation which operates Scadding Court centre. That is the responsibility of the committee of management. The directors of the purported corporation are nominated to Council for appointment to the committee. Once appointed they function as members of the committee, not as directors of the corporation.

25. The continuing existence of the board of management of the eight centres is at the will of the City. Their existence can be ended by a stroke of Council's pen. While the evidence is that the membership of a centre could continue to provide services to its community if the City revoked its by-law, or amended the by-law to eliminate the board, whatever the organization called itself, it would have to be reconstituted in a different form in order to continue its operation.

26. Therefore, on the evidence before the Board, it finds that the boards and committees of management established by the City to operate the eight centres affected by this application have no legal status separate and apart from the City. The evidence demonstrates emphatically that the boards and committees have broad discretion to operate the centres. However, in the words of the Board in *Meaford, supra*, such discretion "... by itself, cannot have the effect of creating [each board or committee] as a separate employer in its own right.". If they are not employers in their own right, then the City is the only legal entity which bears the ultimate burden of an employer under the Act. In these circumstances, the York Condominium tests have no application. Consequently, the Board finds the Corporation of the City of Toronto is the employer of the employees of the eight centres who are affected by this application.

27. In the result, the question of whether section 1(4) of the Act has any application is redundant. That leaves only the question of whether there should be one or eight bargaining units.

28. When the Board is faced with the task of defining appropriate bargaining units of employees of municipalities, usually the Board will define separate units of office staff and all other staff across the whole municipality. These are commonly, if not always correctly, referred

to as the “inside” and “outside” bargaining units and, where a successful application for certification is made for one or the other group of employees, the Board generally certifies the applicant to represent all employees in the particular group, for example, the outside employees, across the municipality even though they may work at or out of different locations. The Board’s approach to defining units of employees of municipalities is one of a few departures made by the Board as a matter of policy from its general approach to defining appropriate bargaining units. Other examples are variety chain stores, Brewers’ Warehousing stores, retail food stores and retail service stores. In this regard, see the Board’s decision in *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293, at paragraph 7 and the quotation therein from the Board’s decision in *The Goodyear Tire Service Stores*, 65 CLLC 16,018. Where one employer operates a business at two or more locations within a single municipality, the Board’s general practice is to find a separate unit of employees at each location to be appropriate for collective bargaining except where the operations at the locations are functionally integrated or the employees at the locations share a community of interest such as would cause the Board to group the employees at the various locations into a single bargaining unit.

29. When the Board is called upon to decide whether a group of employees at one location of several within a municipality would constitute a viable bargaining unit, it has usually relied on the tests set out in its decision in *Usarco Limited*, [1967] OLRB Rep. Sept. 526: community of interest; centralization of managerial authority; and the economic impact, if any, on the employer’s business of having two or more units instead of one. The Board eschews the *Usarco* tests, however, in favour of the other policy considerations in those exceptions referred to above. In the Board’s decision in *Corporation of the Town of Meaford*, [1980] OLRB Rep. Nov. 1611 (hereinafter called “Meaford #2”), the Board did not apply the *Usarco* tests when it decided, having certified the applicant on an interim basis for two units of employees, to issue the formal certificate for a single unit consolidating the two “interim” units. Instead the Board decided on the facts before it not to depart from the usual approach to describing units of municipal employees, which is a policy approach based primarily on the avoidance of undue fragmentation. The Board was concerned in *Meaford #2*, that “ [to] formalize the division of the respondent’s employees into two bargaining units would result in two units of semi-skilled employees, one with four employees and the other with only three.” and further that “... This degree of fragmentation would not be conclusive to stable industrial relations and is not warranted on the facts involved.”.

30. While the facts in *Meaford #2* are rather sketchy, the facts herein are extensive and, amongst other things, establish that management of the centres is highly decentralized in the hands of their boards of management. Those boards have and exercise considerable autonomy from the City in the operation of the centres, particularly with respect of the management of the employees. In these circumstances and in all of the circumstances before the Board, it considers this to be an appropriate case in which to apply the *Usarco* tests of community of interest, centralization of managerial authority and economic impact. The *Usarco* decision sets out six factors for establishing whether there is a community of interest between employees in separate locations within a municipality: 1) nature of the work performed; 2) conditions of employment; 3) skills of employees; 4) administration; 5) geographic circumstances; and 6) functional coherence and interdependence.

31. With respect to the nature of work and the skills of employees, there is no detailed evidence, but the indications from the evidence of the services and activities provided by the



units are that the nature of the work performed and the skills required by core administration employees are similar from one centre to another. To the extent that some of the centres have recreation programs in common, the nature of work and skills of employees involved with programs are similar. At a centre like 519 Church, on the other hand, which does not have a recreation focus but which provides services such as day care for children and a drop-in centre for adults, the nature of the work and employee skills involved with programs would differ from centres like Scadding Court where the focus tends to be on recreation.

32. While there are no common employment policies between the centres, there are incidentally more similarities than differences in their working conditions. With respect to core administration employees, that is a function of the budget process and the fact that employees in jobs of the same grade or value, as determined by the job audit in which the centres participated, are paid within the same salary scale. They also have the same benefits, except for the part-time core staff of 519 Church. Any similarities in pay and benefits for the program staff would result incidentally from the fact that the centres, presumably within the restrictions of their program funding, measure and attempt to meet community or market standards.

33. Administration of the centres is clearly decentralized with each centre's board of management. They are ultimately responsible to Council, but there is no evidence of them having a direct reporting relationship below Council level of the kind commonly associated with the delegation of managerial authority. For example, they do not report in that sense to the Commissioner of Parks and Recreation for the City. They are required by their by-laws to report certain information to certain City officials, but that is strictly informational reporting and stops far short of establishing a managerial relationship. Even Council has delegated to the boards of management complete authority in matters of administration of those functions which are critical to the bargaining unit employees: hiring, firing, discipline, time off, vacation benefits and scheduling, actual rate of pay, the interval and method of payment and control over the funds from which they are to be paid. The City has no direct say in these matters on a day-to-day basis. It can influence them only on a global basis through the core administration budget with respect to the employees covered by it, or by such a draconian step as replacing a board. Thus all matters of administration which bear directly on the bargaining unit employees are in the sole control of the boards.

34. All that can be said about the geographic circumstance is quite obvious, the employees work at centres which are located within the City's boundary. The areas which they serve apparently abut one with the other and in some cases overlap. Nonetheless there is no evidence that the employees at the bargaining unit level of activity in one centre have any social or functional contact with the employees of another centre. If the Board was to draw inferences from the evidence as a whole, it would be that there is no contact between these employees on any but the most random and incidental basis.

35. Turning then to the final factor, functional coherence and interdependence amongst the eight centres or between any pair of them, there is no evidence of any. There is no evidence of any interchange of employees between any two centres. Nor is there any evidence that the centres even exchange information about job openings or available candidates. All of the evidence points to each centre operating entirely independent of the others to serve a different community. The fact that they have banded together in a loose association for the exchange of information generally or for trying to adopt a common position on matters bearing on their individual relationships with the City, or the fact that the City's budget process



requires the eight centres to approach the City at the same time through the same process for their core administration funds does not diminish their independence from each other. Furthermore, the fact that they act independently of each other respecting the raising of their program funds adds reality to the aura of independence.

36. The Board does not attach particular significance to any one factor, but considers all of them. The factors nature of work, conditions of employment and skills of employees are somewhat equivocal respecting there being any community of interest amongst the employees of the eight centres. Geographic circumstances point in the direction of the employees of each centre having their own community of interest. Two factors, administration and functional coherence and interdependence, point overwhelmingly and conclusively to there being a community of interest within the employees of each unit and entirely separate from the employees of the other centres. Therefore, the Board finds that community of interest is exclusively with the employees within each centre and there is no community of interest between the employees of the various centres as would cause the Board, on that test alone, to join the employees in a single bargaining unit.

37. With respect to the two tests centralization of managerial authority and economic impact, the facts are that there is no centralization of managerial authority. Each board of management must determine for itself how to comply with the objects for its centre set out in the by-law under which the centre and its board were established by Council. Except for information reporting responsibilities and compliance with the budget process for the core administration budget, the only centralization of management authority is in each board of management. There is no evidence to suggest that establishing separate bargaining units in the circumstances of the application would have any adverse impact on the City's normal way of carrying on its operations. Obviously it has been functioning for some ten years or more with those of its centres which are managed by boards of management operating independently of each other.

38. The results from applying the community of interest and centralization of managerial authority tests point positively to the employees of each centre constituting separate units of employees appropriate for collective bargaining. No contrary indication is revealed from applying the economic impact test. Therefore, the Board is satisfied that the employees of the Corporation of the City of Toronto at each of the following centres constitute units of employees, subject to the necessary and appropriate exclusions, appropriate for collective bargaining:

- (1) Cecil Street Community Centre;
- (2) Central Eglinton Community Centre;
- (3) Cowan Avenue Firehall;
- (4) Scadding Court Community Centre;
- (5) Ralph Thornton Community Centre;
- (6) The 519 Church Street Community Centre;
- (7) Community Centre 55; and

## (8) Applegrove Community Complex.

39. The Registrar is directed to list this application for hearing with respect to all the matters outstanding.

**DECISION OF BOARD MEMBER C. A. BALLENTINE;**

1. I disagree with the majority.
  2. I believe there should be one municipal-wide bargaining unit pursuant to the Board's policy respecting such units. It makes good labour relations sense to have bargaining co-ordinated.
- 

**0431-85-U Food and Service Workers of Canada, Complainant, v. Windsor Arms Hotel Limited, Respondent**

Change in Working Conditions - Unfair Labour Practice - Bargaining unit classification eliminated during freeze period - Transfer of work out of unit breaching freeze provision - Employee terminated for conduct as observer at arbitration hearing - Conduct not protected by s.80

**BEFORE:** *Lita-Rose Betcherman*, Vice-Chairman, and Board Members *D. M. Blair* and *B. L. Armstrong*.

**APPEARANCES:** *Ron Lebi* and *Cherie Campbell* for the complainant; *I. T. Bern* and *J. Bern* for the respondent.

**DECISION OF THE BOARD;** August 21, 1985

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent (1) altered terms and conditions of work during the freeze period in violation of section 79, and (2) discharged an employee for participating in a proceeding under this Act in violation of section 80. At the commencement of the hearing, the complainant union withdrew allegations of anti-union animus pursuant to sections 64, 66 and 70.
2. On April 19, 1985, the complainant was certified as the bargaining agent for the respondent's part-time employees. For some years it had represented the respondent's full-time staff in two other units.
3. At the time of the application for certification, the hotel's switchboard was operated by two full-time and two part-time employees; the grievor was one of the latter. A full-time

switchboard operator had given notice some time earlier and on April 24th a full-time vacancy was posted. The grievor was one of several applicants for the job.

4. Meanwhile, an arbitration concerning the discharge of an employee named Susan Price was in progress. The first day of hearing in the Price arbitration took place on April 19, the second day of hearing on May 1st. The present grievor attended both days while off duty. She testified that Ms. Price and the union vice-president, Ms. Iler, had asked her to attend. She acknowledged that her offer to testify at the arbitration hearings had not been accepted by the union. In her own words, her purpose in attending the hearings was to provide "emotional support" for Susan Price. Another bargaining unit employee also attended without being called to testify.

5. The hotel's sole witness at the Price arbitration hearings was Mr. P. Jamani, Front Desk Manager and supervisor of both Ms. Price and the present grievor. During Mr. Jamani's testimony on May 1st, the present grievor, who was seated at the rear of the room, suddenly stood up and made various remarks the purport of which was that the witness was lying. She then left the room. On reporting for her next scheduled shift on May 3rd, she was called into Mr. Jamani's office and handed a letter of termination. Shortly thereafter the other part-time switchboard operator was let go and two full-time operators were hired, one working five days a week and the other four days. (A four-day week constitutes full-time employment under the relevant agreement.) Thus the switchboard is now operated by three full-time employees.

6. In his testimony before this Board, Mr. Jamani stated that the grievor's outburst at the arbitration hearing precipitated her dismissal, but that her job performance had been unsatisfactory for some time. A letter of warning from Mr. Jamani to the grievor, dated March 1, 1985, was entered in evidence. He also stated that he had never intended to give her the full-time switchboard position. With regard to the change-over to full-time switchboard operators exclusively, Mr. Jamani stated that he preferred such an arrangement and that it was merely a return to an established practice. Evidence was adduced to establish that prior to 1982 the switchboard was staffed by full-time employees, two employees working five days a week and another working four days. Mr. Jamani testified that he had turned to the use of part-time employees on the switchboard around 1982 because of the difficulty in finding someone who would work a 4-day week. He stated that it was as a result of the April 24th job posting that he found such a person. According to his testimony, a part-time employee on the front desk came forward with a request to work four days a week. He therefore had no further need for part-time personnel on the switchboard.

7. The complainant argued that the elimination of the grievor's part-time position represented an alteration in the terms and conditions of work during the freeze period and therefore a violation of section 79 of the Act. It was contended that eliminating part-time employees on the switchboard was a new departure and one which the employees could not have reasonably expected. Secondly, the complainant submitted that the discharge of the grievor was motivated, at least in part, by her participation in the Price arbitration, and since arbitration was a proceeding under the Act the discharge was in violation of section 80 of the Act.

8. As well as the grievor's reinstatement with full compensation, the union seeks a declaration that the respondent has violated the Act, an order that the respondent cease and desist, and a Board posting in the usual form.



9. While acknowledging that arbitration is a proceeding under the Act, the respondent maintained that the grievor was not protected by section 79 because she attended the Price arbitration hearing as an observer rather than a participant. It was averred that she was discharged because she was a thoroughly unsatisfactory employee. In addition to the evidence of the warning letter and her outburst against her supervisor at the arbitration hearing, counsel for the respondent pointed to her admitted confrontations with numerous members of staff and management during her short employment with the hotel. It was further contended that eliminating part-time positions on the switchboard was not a new departure but business as usual. The hotel had previously used full-time staff only on the switchboard and, the opportunity having presented itself, it had reverted to its original kind of scheduling.

### Statutory Freeze Complaint

10. Section 79(1) and (2) of the Act states:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
  - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
  - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,
 as the case may be; or
- (b) until the right of the trade union to represent the employees has been terminated, whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) The trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

11. Certification was granted on April 19, 1985. No notice to bargain having been served at the relevant period, the employment relationship is caught by the section 79(2) freeze.

12. In *AES Data Limited*, [1979] OLRB Rep. May 368, the Board described the rationale behind the statutory freeze thusly:

The purpose of section 70 [now 79] is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda.

In this light, the employer cannot reorganize work or restructure the work force for the duration of the freeze. While the workforce may be increased or decreased as conditions dictate, work cannot be contracted out or transferred out of the unit unless the employer communicated his intention of doing so prior to the freeze or the employer could establish an existing pattern or practice. See: *Simpsons Limited*, [1985] OLRB Rep. March 469. Furthermore, the Board recognizes that an employer may have to make appropriate adjustments if faced with a "first-time event" or new situation arising during the freeze.

13. In the instant case, the employer eliminated all part-time positions shortly after the union was certified as the bargaining agent for part-time employees. The consent of the union was neither sought nor given. The elimination of a bargaining unit classification must be regarded as a fundamental alteration in the employment relationship. There was no suggestion that the work had disappeared. It was simply transferred out of the bargaining unit. See *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. July 1147.

14. In the Board's view, there was no prior pattern to justify altering the employment relationship in this manner during the freeze. For over two years the employer had utilized part-time as well as full-time switchboard operators. The manager in charge of the switchboard testified that he preferred to use only full-time operators but there is no evidence that this preference was ever communicated to the employees. There was also no evidence that in the intervening two-year period the manager had tried to find someone who would work a 4-day week. As it happened, there was such a person already on staff. Nor were we told of any sudden change in this employee's circumstances enabling her to work a four-day weekly schedule. Consequently, the Board cannot accept the respondent's assertion that the elimination of the part-time switchboard operators and the changeover to full-time operators was in response to a new situation or "first-time" event. The Board finds that the respondent reorganized work and restructured the workforce during the freeze period in violation of section 79(2) of the Act.

### Reprisals Complaint

15. Section 80 of the Act states:

80.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or

- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or

- (b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

16. The initial matter for determination is whether the grievor "participated" in the arbitration in question within the meaning of the section. It is clear on the evidence that she was not there to testify nor to advise the union party. The Board finds that she attended the hearings in the capacity of an observer. Nevertheless, the possibility must not be ruled out that attendance alone, signifying union support, could evoke management reprisals. Had the grievor done nothing more than observe, the Board might have drawn an adverse inference from the fact that she was discharged soon after the hearing. However, the grievor did much more than that. In the presence of the arbitrator, members of management and staff, she called out that her supervisor was lying on the stand. The Board is of the view that her behaviour was potentially prejudicial both to the respondent and to the witness. At the very least, it constituted serious interference with the arbitration process. Coupled with a not entirely satisfactory record, as attested to by a letter of warning, it is not surprising that she was terminated by the supervisor she had publicly maligned. The Board finds that the grievor was not discharged for participating in the arbitration. We are confirmed in this finding by the fact that another employee who attended the hearings was not discharged. On the bare facts of this case, the respondent has satisfied the Board that in discharging the grievor it did not contravene section 80 of the Act.

17. Insofar as the grievor is concerned, the complaint fails. Even if the respondent had not restructured the work force, the grievor would have been terminated. However, the complaint that the respondent contravened the statutory freeze by eliminating the position of part-time switchboard operator is upheld. The Board orders the respondent to return to the staffing pattern on the switchboard which obtained at the commencement of the freeze, i.e. the use of part-time as well as full-time operators, and to maintain this pattern for the duration of the freeze. Any further remedy will be left to the parties. The Board will remain seized of the matter in the event that they encounter difficulties.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1985

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**2746-83-R:**The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. A.M. Citriniti & Co. Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

**2829-83-R:**United Food and Commercial Workers International Union, (Applicant) v. 555618 Ontario Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 260 Dundas Street, in the City of London, save and except assistant hostesses and persons above the rank of assistant hostess." (39 employees in unit). (*Having regard to the agreement of the parties*).

**0504-84-R:**Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Harnett Mechanical Services Inc., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0505-84-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Harnett Mechanical Services Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit).

**0626-84-R:** Ontario Secondary School Teachers' Federation, (Applicant) v. The Waterloo County Board of Education, (Respondent).

Unit: "all occasional teachers employed by the respondent in its secondary school panel in the City of Waterloo, save and except persons covered by subsisting collective agreements." (136 employees in unit).

**1098-84-R:** Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Essex County Automobile Club, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the Essex County Automobile Club in Windsor, Ontario, save and except supervisors, those above the rank of supervisor, driver instructors, sales staff, office and clerical staff and students employed during the school vacation period." (21 employees in unit).

**1738-84-R:** Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. Famz Foods Limited, (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 6654 Tecumseh Road East, Windsor, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess." (39 employees in unit). (*Having regard to the agreement of the parties*).

**1742-84-R:** United Steelworkers of America, (Applicant) v. 472275 Ontario Limited c.o.b. as Industrial Welding Products Co., (Respondent).

Unit: "all employees of the respondent at Hamilton, Oakville and St. Catharines, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).



**1913-84-R:**The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, (Applicant) v. T.S. Mason Contractor, (Respondent).

Unit #1: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices in the employ of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

**1931-84-R:**United Food and Commercial Workers International Union, (Applicant) v. Cara Operations Limited, (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees, Local 88, (Intervener #1) v. Canadian Union of Restaurant and Related Employees, (Intervener #2).

Unit: "all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 1415 Yonge Street, in the City of Toronto, save and except assistant hostesses and persons above the rank of assistant hostess." (44 employees in unit). (*Having regard to the agreement of the parties*).

**0076-85-R:**Sheet Metal Workers' International Association Local Union 537, (Applicant) v. Castle Plumbing and Heating Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

**0168-85-R:**United Food & Commercial Workers Union, Local 409, (Applicant) v. Druxy's Inc. carrying on business as Inn of the Woods, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Town of Kenora, save and except department managers, persons above the rank of department manager, office staff, front desk staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (32 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the Town of Kenora, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department manager,

office and front desk staff.”(44 employees in unit).(*Having regard to the agreement of the parties*).

Unit #3:“all office and front desk staff of the respondent, in the Town of Kenora, save and except department managers, and persons above the rank of department manager.”(8 employees in unit).(*Having regard to the agreement of the parties*).

**0358-85-R:**Labourers’ International Union of North America, Local 183, (Applicant) v. Creson Investments Limited and/or Fairfield Management Inc. and/or Fairfield Management Limited and/or Montevideo Park Ltd. Partnership and/or The South Shore Ltd. Partnership and/or Lakeview Limited Partnership and/or Glen Erin Acres Ltd. Partnership and/or 478182 Ontario Limited, (Respondents).

Unit #1:“all employees of Fairfield Management Limited in the City of Mississauga engaged in cleaning and maintenance at 2645 Battleford Road (Waterford), 2699 Battleford Road (Lakeside Village and Lakeside Place) and 6650 Glen Erin Drive (Bristol Court) including resident superintendents, save and except property manager and persons above the rank of property manager, office and sales staff.”(22 employees in unit).

Unit #2:“all office and sales staff of Fairfield Management Limited in the City of Mississauga at 2645 Battleford Road (Waterford), 2699 Battleford Road (Lakeside Village Lakeside Place), and 6650 Glen Erin Drive (Bristol Court), save and except property manager and persons above the rank of property manager.”(2 employees in unit).

**0394-85-R:**Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Sinclair, Valentine and Frye Limited, (Respondent).

Unit:“all employees of the respondent in London, save and except superintendent, persons above the rank of superintendent, office, clerical, and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”(3 employees in unit).(*Having regard to the agreement of the parties*).

**0441-85-R:**International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Corporation of the City of Toronto, (Respondent) v. Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43, (Intervener).

Unit #1:“all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and persons for whom the Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43 had bargaining rights on May 22nd, 1985, the date of application.”(23 employees in unit).

Unit #2:“all electricians and electricians’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector and persons above the rank of non-working foreman and persons for whom the Canadian Union of Public Employees, Metropolitan Toronto Civic Employees Union, Local 43 had bargaining rights on May 22nd, 1985, the date of the application.”(23 employees in unit).

**0449-85-R:**Canadian Union of Public Employees, (Applicant) v. The Welland County Roman Catholic Separate School Board, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

Unit #2: "all office and clerical employees of the respondent at its schools in the Regional Municipality of Niagara, save and except employees in the bargaining units for which any trade union held bargaining rights as of May 22, 1985." (45 employees in unit). (*Having regard to the agreement of the parties*).

**0456-85-R:**United Steelworkers of America, (Applicant) v. Shaw Pipe Protection Limited, (Respondent).

Unit: "all employees of the respondent in the City of Hamilton, save and except foremen and those above the rank of foreman, office and sales staff and students employed during the school vacation period." (43 employees in unit).

**0478-85-R:**Ontario Public Service Employees Union, (Applicant) v. The Donwood Institute, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except department heads and persons above the rank of department head, professional medical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of May 27, 1985 being the date of application." (20 employees in unit). (*Having regard to the agreement of the parties*).

**0479-85-R:**Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Universal Building Maintenance, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

**0494-85-R:**Hotels, Clubs, Restaurants and Taverns Employees Union Local 261, (Applicant) v. Crawley & McCracken Company Limited, (Respondent).

Unit: "all employees of the respondent at the Federal Study Centre, 1495 Heron Road, Ottawa, save and except chef, assistant manager, persons above the rank of assistant manager and office staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

**0497-85-R:**United Food and Commercial Workers International Union Local 175, (Applicant) v. Robin Hood Multifoods Inc., (Respondent).

Unit: "all employees of the respondent at its Glassgoods Division, carrying on business as Bicks, in the Town of Dunnville, save and except line foremen, persons above the rank of line foreman, office and sales staff, and seasonal employees." (69 employees in unit).

**0534-85-R:**Ontario Secondary School Teachers' Federation, (Applicant) v. The Carleton Board of Education, (Respondent).



Unit: "all occasional teachers employed by the respondent in its secondary school panel in the Regional Municipality of Ottawa-Carleton, save and except employees in the bargaining units for which any trade union held bargaining rights as of June 4, 1985." (262 employees in unit). (*Clarity Note*).

**0538-85-R:** Peterborough Typographical Union, Local 248, (Applicant) v. Northumberland Publishers Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent company employed at the Cobourg Daily Star, Cobourg, Ontario, save and except the publisher, production manager, the editorial director, the managing editor, secretary to the publisher, the advertising manager, the controller/business manager, the circulation manager, accounting manager and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (30 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent company employed at the Port Hope Evening Guide, Port Hope, Ontario, save and except the general manager, the managing editor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #3: "all employees of the respondent company at the Campbellford Herald, Campbellford, Ontario, save and except advertising manager and managing editor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #4: "all employees of the respondent company employed at the Newcastle Reporter, Newcastle, Ontario, save and except persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #5: (See: *Applications for Certification Dismissed - No Vote Conducted*).

**0552-85-R:** Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Laminated Textiles Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

**0558-85-R:** London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L.-C.I.O.-C.L.C., (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local #1256, (Respondent).

Unit: "all office and clerical employees of the respondent at Sarnia, Ontario, save and except supervisors and persons above the rank of supervisor." (3 employees in unit). (*Having regard to the agreement of the parties*).

**0559-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Mardave Construction Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes,

shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(5 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(5 employees in unit).

**0564-85-R:**Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Star Quality Office Furniture Mfg. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Concord, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.”(18 employees in unit).(*Having regard to the agreement of the parties*).

**0566-85-R:**International Woodworkers of America, (Applicant) v. Lajambe Forest Products Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Garden River Indian Reserve, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.”(28 employees in unit).(*Having regard to the agreement of the parties*).

**0572-85-R:**Service Employees Union, Local 210 Affiliated with Service Employees International Union AFL-CIO-CLC, (Applicant) v. Windsor Roman Catholic Separate School Board, (Respondent).

Unit: “all employees of the respondent in Windsor save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of June 5th, 1985 being the date of application.”(57 employees in unit).(*Having regard to the agreement of the parties*).

**0585-85-R:**Ontario Public Service Employees Union, (Applicant) v. Norfolk Association for the Mentally Retarded, (Respondent).

Unit: “all employees of the respondent at Simcoe, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except executive director, assistant to the executive director, manager - Arc Industries, directors of residences, supervisor community activity programme, director - pre-school programme, office and clerical employees and employees in bargaining units for which any trade union held bargaining rights as of June 7, 1985.”(19 employees in unit).(*Having regard to the agreement of the parties*).

**0591-85-R:**Service Employees' Union Local 210, affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Central Park Lodges, (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, undergraduate dieticians, technical personnel, stationary engineers, supervisors, foremen, persons above the rank of supervisor or foreman, chief engineer, students employed during the summer vacation period, and persons covered by subsisting collective agreements." (4 employees in unit). (*Having regard to the agreement of the parties*).

**0594-85-R:**International Woodworkers of America, (Applicant) v. Lajambe Forest Products Limited, (Respondent).

Unit: "all employees of the respondent in the Township of Awere, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

**0600-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Ruggedair Systems Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0632-85-R:**Canadian Paperworkers Union, (Applicant) v. Dominion Manufacturers Limited, (Respondent).

Unit: "all employees of the respondent in its Danway Wood Products Division in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, installers, and students employed during the school vacation period." (39 employees in unit). (*Having regard to the agreement of the parties*).

**0633-85-R:**United Textile Workers of America, (Applicant) v. Alltour Marketing Support Services Ltd., (Respondent).

Unit: "all employees of the respondent in the Town of Hawkesbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (20 employees in unit). (*Having regard to the agreement of the parties*).

**0657-85-R:**Retail, Wholesale and Department Store Union, (Applicant) v. Educator Supplies Limited, carrying on business as Educator Supplies and Scholar's Choice, (Respondent) v. Employee, (Objectors).



Unit: "all employees of the respondent in the City of London save and except Warehouse Manager, those above the rank of Warehouse Manager, Office Manager, Distribution Manager, Advertising Manager, Purchasing Manager, Accounting Manager, Store Manager, Store Supervisor, Store Manager Trainees, Contracts Manager, office, clerical and outside sales staff, retail sales staff, employees working in the Edcom Multimedia Products Division, employees working in the Ron Nelson Audio Visual Division, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0658-85-R:** Retail, Wholesale and Department Store Union, (Applicant) v. Educator Supplies Limited, carrying on business as Educator Supplies and Scholar's Choice, (Respondent).

Unit: "all office and clerical employees of the respondent in the City of London save and except Office Manager, persons above the rank of Office Manager, Distribution Manager, Advertising Manager, Purchasing Manager, Accounting Manager, Store Manager, Store Supervisor, Store Manager Trainees, Contracts Manager, outside sales staff, retail sales staff, employees working in the Edcom Multimedia Products Division, employees working in the Ron Nelson Audio Visual Division, and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0668-85-R:** Ontario Catholic Occasional Teachers' Association, (Applicant) v. Lincoln County Roman Catholic Separate School Board, (Respondent).

Unit: "all occasional teachers employed by the respondent in its schools in the County of Lincoln, save and except employees in bargaining units for which any trade union held bargaining rights as of June 17, 1985." (116 employees in unit). (*Having regard to the agreement of the parties*).

**0669-85-R:** United Steelworkers of America, (Applicant) v. Waltec Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #2: "all employees of the respondent at its Waltec Components Division Machining Plant, 125 Mason Street in Wallaceburg, save and except foremen, persons above the rank of foreman, office, clerical, and sales staff, and students employed during the school vacation period." (113 employees in unit). (*Having regard to the agreement of the parties*).

**0670-85-R:** United Steelworkers of America, (Applicant) v. Waltec Inc., (Respondent).

Unit: "all employees of the respondent at its Waltec Industries Division at Wallaceburg, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period." (152 employees in unit). (*Having regard to the agreement of the parties*).

**0671-85-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Dynamic Distributors, a division of Apple Auto Glass Limited, (Respondent).

Unit: "all employees of the respondent at its distribution centre in Metropolitan Toronto, save and except supervisor, persons above the rank of supervisor, dispatchers, office and sales staff,

persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.”(9 employees in unit).(*Having regard to the agreement of the parties*).

**0683-85-R:**Labourers’ International Union of North America Local 527, (Applicant) v. Aman-tea Masonry Contractors, (Respondent).

Unit #1:“all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).

Unit #2:“all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).

**0684-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Jerona Construction Ltd., (Respondent).

Unit #1:“all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(3 employees in unit).

Unit #2:“all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(3 employees in unit).

**0690-85-R:**United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, (Applicant) v. Hamilton Design Sprinklers Inc., (Respondent).

Unit #1:“all sprinkler fitters and sprinkler fitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).

Unit #2:“all sprinkler fitters and sprinkler fitters’ apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).

**0692-85-R:**Hotels, Clubs, Restaurants & Taverns Employees' Union Local 261, (Applicant) v. 447963 Ontario Limited, (Respondent).

Unit: "all employees of the respondent at 1252 Michael Street, Gloucester, save and except head housekeeper, persons above the rank of head housekeeper, front desk clerks, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

**0693-85-R:**Hotels, Clubs, Restaurants and Taverns Employees' Union Local 261, (Applicant) v. 547691 Ontario Limited, (Respondent).

Unit: "all employees of the respondent at 222 Hearst Way, Kanata, save and except head housekeeper, persons above the rank of head housekeeper, front desk clerks, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

**0695-85-R:**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508, (Applicant) v. R.F. Contracting, (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0698-85-R:**Service Employees International Union Local 204 affiliated with the S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. 60 York Street Ltd., c.o.b. as The Strathcona Hotel, (Respondent).

Unit: "all employees of the respondent in the City of Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of June 19, 1985 being the date of application." (28 employees in unit). (*Having regard to the agreement of the parties*).

**0705-85-R:**United Steelworkers of America, (Applicant) v. Blackwood Hodge Equipment Limited (Central Division Sudbury Branch), (Respondent).

Unit: "all employees of the respondent in Sudbury, (does not include employees in respondent's Industrial Rubber Branch or employees in respondent's Suntrack Rentals Division), save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).



**0724-85-R:**Canadian Paperworkers Union, (Applicant) v. 564173 Ontario Inc., c.o.b. as Cam Tran Co., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent carrying on business as Cam Tran Co. in Colborne, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff." (28 employees in unit). (*Having regard to the agreement of the parties*).

**0731-85-R:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. W.R. McRae Wholesale Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Kingston, save and except supervisors, persons above the rank of supervisor, buyers, outside sales staff, secretary to the president, and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

**0733-85-R:**United Food and Commercial Workers International Union C.I.O.-A.F.L.-C.L.C., (Applicant) v. Riverview Nursing Home (1984) Limited, (Respondent).

Unit: "all employees of the respondent at its Nursing Home in the County of Lanark, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, activity co-ordinator, office and clerical staff." (34 employees in unit). (*Having regard to the agreement of the parties*).

**0734-85-R:**Energy and Chemical Workers Union, (Applicant) v. St. Lawrence Cement Inc. operating as Dufferin Aggregates, (Respondent).

Unit: "all employees engaged as drivers working at or out of the respondent's quarry at Milton, save and except dispatcher, persons above the rank of dispatcher, office staff, and persons represented by virtue of any subsisting collective agreements." (22 employees in unit).

**0735-85-R:**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508, (Applicant) v. Industrial Piping, (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0745-85-R:**Graphic Communications International Union, Local 500M, (Applicant) v. Rammgraph Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week." (14 employees in unit). (*Having regard to the agreement of the parties*).

**0746-85-R:**United Food & Commercial Workers International Union, Local 175 AFL-CIO-CLC, (Applicant) v. Boucher Building Supplies Limited, (Respondent).

Unit: "all employees of the respondent in the Town of Gananoque and the Townships of Leeds and Lansdowne, save and except general manager, persons above the rank of general manager, office, sales and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

**0752-85-R:**Retail, Wholesale and Department Store Union, (Applicant) v. Hostess Food Products Limited, (Respondent).

Unit: "all employees of the respondent at Cambridge (Preston), Ontario, save and except foremen/foreladies, persons above the rank of foreman/forelady, office, clerical and technical staff, sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (249 employees in unit). (*Having regard to the agreement of the parties*).

**0756-85-R:**Local 47 Sheet Metal Workers' International Association, (Applicant) v. Nicholls Radtke and Associates Limited, (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices, sheeters, sheeters' assistants and material handlers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices, sheeters, sheeters' assistants and material handlers in the employ of the respondent in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

**0804-85-R:**Ontario Public Service Employees Union, (Applicant) v. Nipissing College, (Respondent).

Unit: "all office, clerical, and technical employees of the respondent in the City of North Bay, save and except supervisors, persons above the rank of supervisor, secretary to the president, secretary to the director of administration and the personnel officer, persons regularly employed for not more than twenty-four hours per week and students employed in the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0805-85-R:**Service Employees International Union Local 204 affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. The Ontario Jockey Club, (Respondent).

Unit #1: "all employees of the respondent engaged in maintenance at Fort Erie Race Track in Fort Erie, Ontario, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and employees in bargaining units for which any trade union

held bargaining rights as of July 2, 1985, being the date of application.”(28 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

Unit #2:“all employees of the respondent engaged in maintenance regularly employed for not more than twenty-four hours per week and students employed during the school vacation period at Fort Erie Race Track in Fort Erie, Ontario, save and except foremen, persons above the rank of foreman, office staff, and employees in bargaining units for which any trade union held bargaining rights as of July 2, 1985, being the date of application.”(28 employees in unit).(*Having regard to the agreement of the parties*).

**0817-85-R:**Service Employees’ Union Local 210, affiliated with Service Employees’ International Union, AFL, CIO, CLC, (Applicant) v. Anderdon Estates Limited c.o.b. as The Exchange Restaurant and Tavern, (Respondent).

Unit:“all employees of the respondent in Windsor, save and except supervisors, persons above the rank of supervisor, and office staff.”(38 employees in unit).(*Having regard to the agreement of the parties*).

**0839-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Jovis Construction, (Respondent).

Unit #1:“all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).

Unit #2:“all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).

**0840-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. D.I. Construction Co. Inc., (Respondent).

Unit #1:“all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).

Unit #2:“all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(2 employees in unit).



**0856-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. Horne's Concrete Works Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

**0925-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Ferro Concrete Limited, (Respondent).

Unit: "all employees of the respondent engaged in concrete forming on residential building projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**0437-84-R:**Labourers' International Union of North America, (Applicant) v. Canada's Capital Building Services Limited, (Respondent).

Unit: "all employees of the respondent at Lester B. Pearson International Airport, Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (242 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		195
Number of names of persons who cast ballots	160	
Number of spoiled ballots		12
Number of ballots marked in favour of applicant		92
Number of ballots marked against applicant		42
Ballots segregated and not counted		13

**0222-85-R:**Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), (Applicant) v. The Globe and Mail Division of Canadian Newspapers Company Limited, (Respondent).

Unit #1: "all employees of the respondent employed in its Advertising Sales Departments at its newspaper offices at 444 Front Street West in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, secretary to the Director of Advertising Sales, secretary to the General Sales Manager Retail and Classified, secretary to the General Sales Manager National and Report on Business, secretary to the Classified

Advertising Manager, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in the bargaining units for which any trade union held bargaining rights as of April 29th, 1985, being the date of application.”(135 employees in unit).(*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list	138
Number of names of persons who cast ballots	138
Number of ballots marked in favour of applicant	72
Number of ballots marked against applicant	64
Ballots segregated and not counted	2

Unit #2: (See: *Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote*).

**0255-85-R:**Canadian Paperworkers Union, (Applicant) v. Carlton Cards Ltd., (Respondent) v. Independent Greeting Card Workers’ Union of Canada, (Intervener).

Unit:“all plant production employees of the company, except watchmen, group leaders, supervisors, persons above the rank of supervisor, office, clerical and sales staff.”(964 employees in unit).(*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list	1048
Number of persons who cast ballots	893
Number of spoiled ballots	14
Number of ballots marked in favour of applicant	500
Number of ballots marked in favour of intervener	374
Ballots segregated and not counted	5

**0519-85-R:**Service Employees Union, Local 183, (Applicant) v. The Reid’s Dairy Company Limited, (Respondent).

Unit #1: (See: *Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote*).

Unit #2:“all office and clerical employees of the respondent in Belleville, save and except managers and persons above the rank of manager.”(5 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**3258-84-R:**Labourers’ International Union of North America, Local 183, (Applicant) v. Joseph Schmidt Carpentry Limited, (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit:“all carpenters and carpenters’ apprentices in the employ of the respondent engaged in residential construction in the Province of Ontario (excluding Board Areas #1 and 19-25, inclusive), save and except non-working foremen and persons above the rank of non-working foreman.”(7 employees in unit).

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	0

**0080-85-R:**The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800, (Applicant) v. Goldbelt Construction Ltd., (Respondent).

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (19 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	8

**0095-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Elgin County Library Board, (Respondent).

Unit: "all employees of the respondent in Elgin County, save and except Assistant Chief Librarian, persons above the rank of Assistant Chief Librarian, Bookkeeper/Confidential Secretary to the Chief Librarian, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (7 employees in unit).

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1

**0115-85-R:**International Union of Operating Engineers, Local 796, (Applicant) v. Central Soya of Canada Ltd., (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101, (Intervener).

Unit: "all stationary engineers and persons primarily engaged as their helpers employed in the boiler room of the respondent at its Victory Soya Mills Division in Toronto, save and except assistant chief engineer and persons above the rank of assistant chief engineer." (7 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	0

**0128-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. S.H. Carpentry Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).



Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	1

**0157-85-R:** Labourers' International Union of North America Local 183, (Applicant) v. 573766 Ontario Limited and/or Praetor Holdings Inc., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent 573766 Ontario Limited in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of intervener	0

**0348-85-R:** Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. The North York General Hospital, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, office and clerical staff, supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (174 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	171
Number of persons who cast ballots	79
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	73
Number of ballots marked against applicant	1
Ballots segregated and not counted	4

### Applications for Certification Dismissed - No Vote Conducted

**0154-84-R:** Ontario Secondary School Teachers' Federation, (Applicant) v. Ottawa Board of Education, (Respondent). (78 employees in unit).

**0485-84-R:**Retail, Commercial & Industrial Union, Local 206 (Chartered by the United Food and Commercial Workers International Union), (Applicant) v. J. Pascal Inc., (Respondent).(53 employees in unit).

**1486-84-R:**United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Dallas Homes Inc., (Respondent).(23 employees in unit).

**0442-85-R:**Labourers' International Union of North America Local 527, (Applicant) v. Aman-tea Masonry Contractors, (Respondent).(2 employees in unit).

**0538-85-R:**Peterborough Typographical Union, Local 248, (Applicant) v. Northumberland Publishers Limited, (Respondent) v. Group of Employees, (Objectors).(1 employee in unit).

Units #1-4: (See: *Bargaining Agents Certified - No Vote Conducted*).

**0584-85-R:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Collins & Aikman (Ontario) Ltd., (Respondent) v. Group of Employees, (Objectors).(97 employees in unit).

**0586-85-R:**Service Employees International Union Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Extendicare Health Services Inc., (Respondent).(24 employees in unit).

**0667-85-R:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Degussa Canada Ltd., (Respondent) v. Group of Employees, (Objectors).(37 employees in unit).

**0669-85-R:**United Steelworkers of America, (Applicant) v. Waltec Inc., (Respondent) v. Group of Employees, (Objectors).(96 employees in unit).

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

**0736-85-R:**Labourers' International Union of North America Local 1081, (Applicant) v. Mas-con Limited, (Respondent).(2 employees in unit).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**2913-84-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 81, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Kenting Earth Sciences Limited, (Respondent).

Unit: "all employees of the respondent working at or out of its head office at Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical, and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (72 employees in unit).

Number of names of persons on list as originally prepared by employer	64
Number of persons who cast ballots	72
Number of ballots cast in favour of applicant	21
Number of ballots marked against applicant	50
Number of ballots spoiled	1

**0222-85-R:** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), (Applicant) v. The Globe and Mail Division of Canadian Newspapers Company Limited, (Respondent).

Unit #1: (See: *Bargaining Agents Certified Subsequent to a Pre-Hearing Vote*).

Unit #2: "all employees of the respondent employed in its Advertising Sales Departments at its newspaper offices at 444 Front Street West in the Municipality of Metropolitan Toronto, employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in the Advertising Sales Departments, save and except supervisors, persons above the rank of supervisor, secretary to the Director of Advertising Sales, secretary to the General Sales Manager Retail and Classified, secretary to the General Sales Manager National and Report on Business, secretary to the Classified Advertising Manager, and employees in the bargaining units for which any trade union held bargaining rights as of April 29th, 1985, being the date of application." (9 employees in unit).

Number of names of persons on list as originally prepared	11
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	6

**0519-85-R:** Service Employees Union, Local 183, (Applicant) v. The Reid's Dairy Company Limited, (Respondent).

Unit #1: "all employees of the respondent in Belleville, save and except managers, persons above the rank of manager, office and clerical staff, persons employed in retail stores, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (34 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer	27
Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	21

Unit #2: (See: *Bargaining Agents Certified Subsequent to a Pre-Hearing Vote*).



**0587-85-R:**Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Texas and Dr. Detroit Inc. c.o.b. Casey's Restaurants, (Respondent).

Unit: "all employees of the respondent in the City of Windsor, Ontario, save and except manager, supervisors, persons above the rank of supervisor, office and sales staff." (51 employees in unit).

Number of names of persons on revised voters' list		51
Number of persons who cast ballots	46	
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		26
Ballots segregated and not counted		2

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**0044-85-R;0045-85-R:**United Steelworkers of America, (Applicant) v. Kuehne & Nagel Distribution Services, Division of Kuehne & Nagel International Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the municipalities of Brampton and Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (143 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		126
Number of persons who cast ballots	144	
Number of ballots marked in favour of applicant		51
Number of ballots marked against applicant		82
Ballots segregated and not counted		11

**0449-85-R:**Canadian Union of Public Employees, (Applicant) v. The Welland County Roman Catholic Separate School Board, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all office and clerical employees of the respondent at its administration offices in the Regional Municipality of Niagara, save and except supervisors, those above the rank of supervisor, the secretary to the Director of Education, the secretary to the Business Administrator, the secretary to the Controller of Plant, the head payroll clerk, child care workers, technicians, teacher's aides, and employees in the bargaining units for which any trade union held bargaining rights as of May 22, 1985." (45 employees in unit).

Number of names of persons on list as originally prepared by employer	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	18
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	15
Ballots segregated and not counted	1

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

**0476-85-R:**United Steelworkers of America, (Applicant) v. MacDonald Steel (1976) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons employed on a co-operative training program." (145 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		127
Number of persons who cast ballots	123	
Number of ballots marked in favour of applicant		48
Number of ballots marked against applicant		70
Ballots segregated and not counted		5

**0541-85-R:**Ontario Nurses' Association, (Applicant) v. Specialty Care Inc. c.o.b. as Franklin Lake Manor Nursing Home, (Respondent) v. Group of Employees, (Objectors).

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity at Inverary, Ontario, save and except head nurse and persons above the rank of head nurse." (6 employees in unit).

Number of names of persons on list as originally prepared by employer		4
Number of names of persons who cast ballots	4	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		2

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0264-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. 581201 Ontario Limited, Bayview Summit Development Ltd., (Respondents).

**0420-85-R:**Labourers' International Union of North America, Local 527, (Applicant) v. Geo. Robson Construction Ltd., (Respondent).

**0501-85-R:**International Union of Bricklayers & Allied Craftsmen, (Applicant) v. Design Build Niagara Inc., (Respondent).

**0511-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Leo Alarie & Sons Limited, (Respondent) v. Group of Employees, (Objectors).

**0565-85-R:**The University of Guelph Food Services Employees Association, (Application) v. The University of Guelph, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

**0573-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. Fos-Tur Pipelines Inc., Les Pipelines Fos-Tur Inc., (Respondent).

**0655-85-R:**Energy and Chemical Workers Union, CLC, (Applicant) v. Quinte Pre-Cast Concrete Ltd., (Respondent).

**0761-85-R:**Upholsterers' International Union of N.A., (Applicant) v. Sealy Upholstery (Canada) Inc., (Respondent) v. The Laundry and Linen Drivers and Industrial Workers' Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

**0820-85-R:**Ontario Public Service Employees Union, (Applicant) v. Mini-Skools Limited, (Respondent).

## **APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER**

**1691-84-R:**Canadian Union of Public Employees, Local 197, (Applicant) v. The Corporation of the City of Stratford and K. & E. Solid Waste Management, a Division of W. Kuindersma & J. Esser Limited, (Respondents).(*Dismissed*).

**2164-84-R:**Labourers' International Union of North America, Local 527, (Applicant) v. Olivieri Masonry Limited, Ottawa-Carleton Bricklaying and Masonry Limited, Olivieri Forming Ltd., (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 1030, (Intervener).(*Granted*).

**3162-84-R:**United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Praetor Holdings Inc., and 573766 Ontario Limited, (Respondent).(*Withdrawn*).

**0044-85-R;0045-85-R:**United Steelworkers of America, (Applicant) v. Kuehne & Nagel International Limited, and 3M Canada Inc., (Respondents) v. Group of Employees, (Objectors).(*Withdrawn*).

**0157-85-R:**Labourers' International Union of North America Local 183, (Applicant) v. 573766 Ontario Limited and/or Praetor Holdings Inc., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).(*Granted*).

**0295-85-R:**International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. West York Construction Limited, and West York Construction (1984) Limited, (Respondents).(*Granted*).

**0619-85-R:**International Association of Heat and Frost Insulators & Asbestos Workers, Local 95, (Applicant) v. Niagara Peninsula Insulation Limited, Key Insulation Limited, 597457 Ontario Ltd. c.o.b. as Hamilton Insulation Services, (Respondents).(*Granted*).

## **SALE OF A BUSINESS**

**1692-84-R:**Canadian Union of Public Employees, Local 197, (Applicant) v. The Corporation of the City of Stratford and K. & E. Solid Waste Management, a Division of W. Kuindersma & J. Esser Limited, (Respondent).(*Dismissed*).



**2164-84-R:**Labourers' International Union of North America, Local 527, (Applicant) v. Olivieri Masonry Limited, Ottawa-Carleton Bricklaying and Masonry Limited, Olivieri Forming Ltd., (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 1030, (Intervener).(*Granted*).

**3256-84-R:**Soft Drink Workers Joint Local Executive Board of Ontario, (Applicant) v. Pepsi-Cola Bottling Company of Ottawa (Pepsi-Cola Canada Ltd.), (Respondent).(*Withdrawn*).

**3257-84-R:**Soft Drink Workers Joint Local Executive Board of Ontario of the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Pepsi-Cola Canada Ltd., (Respondent).(*Withdrawn*).

**0295-85-R:**International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. West York Construction Limited, and West York Construction (1984) Limited, (Respondents).(*Granted*).

**0619-85-R:**International Association of Heat and Frost Insulators & Asbestos Workers, Local 95, (Applicant) v. Niagara Peninsula Insulation Limited, Key Insulation Limited, 597457 Ontario Ltd. c.o.b. as Hamilton Insulation Services, (Respondents).(*Granted*).

## CROWN TRANSFER ACT

**0422-85-R:**The Corporation of the City of Thunder Bay, (Applicant) v. Ontario Public Service Employees Union, (Respondent) v. Group of Employees, (Objectors).(*Dismissed*).

## UNION SUCCESSOR RIGHTS

**3198-84-R:**Graphic Communications International Union, Local 582-S, Kemptville, (Applicant) v. Moore Business Forms, Division of Moore Corporation Limited, Kemptville, (Respondent).(*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**3497-84-R:**The St. Catharines Association for the Mentally Retarded, (Applicant) v. Canadian Union of Public Employees and its Local 2276, (Respondent) v. Group of Employees, (Objectors).(27 employees in unit).(*Dismissed*).

**0215-85-R:**James Wreaks, Joseph Arruda, Robert Brazier, Lanny Brazier, Marjorie Bond and Dean Dunham, (Applicants) v. Christian Labour Association of Canada, (Respondent) v. United Springs Limited, (Intervener).(6 employees in unit).(*Granted*).

**0313-85-R:**Manuel de Souza and Michael Robert Golos, (Applicants) v. Labourers' International Union of North America, Local 183, (Respondent).(2 employees in unit).(*Granted*).

**0315-85-R:**The Workers of Ferrier Wire Goods Co. Ltd., (Applicant) v. United Steelworkers of America, (Respondent).(3 employees in unit).(*Granted*).

**0344-85-R:**John Turcic, (Applicant) v. Labourers' Union Local 183, (Respondent) v. Fred Schaeffer & Associates Limited, (Intervener).(7 employees in unit).(Granted).

**0346-85-R:**C & B Corrugated Containers Inc., (Applicant) v. Canadian Paperworkers Union, (Respondent).(7 employees in unit).(Granted).

**0365-85-R:**Maurice Ostifichuk, (Applicant) v. International Union of Operating Engineers, Local 796, (Respondent) v. Northern Telecom Electronics, (Intervener).(8 employees in unit).(Dismissed).

**0367-85-R:**Grace Dramantas, on behalf of all registered and graduate nurses employed by the St. Elizabeth Home Society, (Applicant) v. Service Employees' International Union, Local 532, (Respondent).(13 employees in unit).(Granted).

**0370-85-R:**Glenn Law (Shop Steward), (Applicant) v. International Union of Operating Engineers Local 796, (Respondent) v. Citicom Inc., (Intervener).(9 employees in unit).(Dismissed).

**0553-85-R:**Sarbjee Singh, (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. Local 195, (Respondent) v. C.M.C. Tool Inc., (Intervener).(5 employees in unit).(Granted).

**0555-85-R:**Niagara-on-the-Lake Hydro Electric Commission, (Applicant) v. International Brotherhood of Electrical Workers Local 636, (Respondent).(2 employees in unit).(Granted).

**0644-85-R:**Garry Bulmer, (Applicant) v. Canadian Guards Association, (Respondent) v. McMaster University, (Intervener).(13 employees in unit).(Withdrawn).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**0753-85-U:**Tecumseh Products of Canada Limited, (Applicant) v. The United Automobile Aerospace Agricultural Implement Workers of America, and its Local 27, Al Seymour, Steven Rae, James Timmins, (Respondents).(Dismissed).

**0771-85-U:**Consumers Distributing Company Limited, (Applicant) v. Peter Harte, Joe Donato, Robert Pucl, John Fleming and Locksley Blades, (Respondents).(Withdrawn).

**0871-85-U:**3M Canada Inc., London, Ontario Plant, (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.-C.I.O.) and Randy Mason, (Respondent).(Withdrawn).

**0937-85-U:**Mercury Marine Limited, (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 252 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Arnold Kowal, Hans Neumann, Seudath Deonarine, Darshan Banayat, Rhonda Micholls, Ruth Neumann et al. (see Schedule "A"), (Respondents).(Granted).

**0969-85-U:**Steinberg Inc., (Applicant) v. Teamsters Local Union No. 419, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Vernon McGuire, Douglas Power, Ralph O'Quinn and Orlando Trinchi, (Respondents).(Withdrawn).

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)**

**0704-85-U:**Horton CBI Limited, (Applicant) v. International Association of Bridge, Structural and Ornamental Ironworkers Local 759 and Bob Stoppel, (Respondents).(*Granted*).

**0994-85-U:**Mollenhauer Limited, Contractors & Engineers, (Applicant) v. The Structural and Ornamental Ironworkers, Local 721 and John Donaldson, (Respondent).(*Withdrawn*).

**1005-85-U:**Mollenhauer Limited, Contractors & Engineers, (Applicant) v. International Union of Bricklayers and Allied Craftsmen, Local 2 and John Robbins, (Respondent).(*Withdrawn*).

## **COMPLAINTS OF UNFAIR LABOUR PRACTICE**

**1104-83-U:**Gerald Lecuyer, Cash Podlewski and John Polhill, (Complainants) v. Canadian Paperworkers Union, Local 132 and Canadian Paperworkers Union, (Respondents) v. Abitibi-Price Inc., (Intervener).(*Granted*).

**2410-83-U:**United Food and Commercial Workers International Union, (Complainant) v. Foodcorp Limited, (Respondent #1) v. Swiss Chalet Employers' Association on behalf of its member Viriato Foods Inc., (Respondent #2) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union AFL-CIO-CLC, Local 88, (Intervener).(*Granted*).

**0486-84-U:**Retail, Commercial & Industrial Union, Local 206 (Chartered by the United Food and Commercial Workers International Union), (Complainant) v. J. Pascal Inc., (Respondent).(*Granted*).

**1496-84-U:**Mostafa Ateshin, (Complainant) v. Teamsters Local Union 647, (Respondent).(*Dismissed*).

**2165-84-U:**Labourers' International Union of North America, Local 527, (Complainant) v. Olivieri Masonry Limited, Ottawa-Carleton Bricklaying and Masonry Limited, Olivieri Forming Ltd., United Brotherhood of Carpenters and Joiners of America General Workers Union, Local 1030 and Frank Manoni, (Respondents).(*Granted*).

**2720-84-U:**Association of Allied Health Professionals, (Complainant) v. Kingston, Frontenac, and Lennox and Addington Health Unit, (Respondent).(*Withdrawn*).

**2771-84-U:**Labourers' International Union of North America, Local 1267, (Complainant) v. Laidlaw Waste Systems Ltd., (Respondent).(*Withdrawn*).

**3065-84-U:**Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Canlube Ltd. (c.o.b. as Mr. Lube Truck Centre), (Respondent).(*Withdrawn*).

**3111-84-U:**London and District Service Workers' Union, Local 220, (Complainant) v. Norfolk Haldimand Regional Nursing Home (Port Dover), (Respondent).(*Withdrawn*).



**3278-84-U:**Len G. Gauthier, (Complainant) v. Hugo Rossini and Labourers' International of North America, Jimmie Lewis and Labourers' International of North America, Local 1036, N. Waldbillig and O.J. Pipeline Contractors, (Respondents).(*Withdrawn*).

**3279-84-U:**Michel S. Gauthier, (Complainant) v. Hugo Rossini and Labourers' International Union of North America, Jimmie Lewis and Labourers' International Union of North America, Local 1036, N. Waldbillig and O.J. Pipeline Contractors, (Respondents).(*Withdrawn*).

**0068-85-U:**The International Association of Machinists and Aerospace Workers District Lodge 717, (Complainant) v. Caravan Trailer Rental Company Ltd., (Respondent).(*Withdrawn*).

**0140-85-U:**Ontario Hydro Employees' Union, C.U.P.E. Local 1000, (Complainant) v. Ontario Hydro, (Respondent).(*Withdrawn*).

**0170-85-U:**Energy and Chemical Workers Union, (Complainant) v. Petro-Canada Products, (Respondent).(*Withdrawn*).

**0203-85-U:**United Food & Commercial Workers Union, Local 409, (Complainant) v. Druxy's Inc. carrying on business as Inn of the Woods, (Respondent).(*Withdrawn*).

**0211-85-U:**Madeleine Cloutier, (Complainant) v. Pat Taylor (Chairperson) and Lanny Elliott (Plant Manager), (Respondents).(*Withdrawn*).

**0227-85-U:**Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Ideal Glass & Mirror Manufacturing Limited, (Respondent).(*Withdrawn*).

**0326-85-U:**The Association of Professional Student Services Personnel, (Complainant) v. The Board of Education for the City of York, (Respondent) v. Elizabeth A. Carveth, (Intervener).(*Dismissed*).

**0400-85-U:**Retail, Wholesale and Department Store Union AFL:CIO:CLC:, (Complainant) v. C.A. Dunnett & Sons Limited c.o.b. Niagara Farms Market, (Respondent).(*Withdrawn*).

**0411-85-U:**Ontario Nurses' Association, (Complainant) v. Vernon Nursing Home Services Ltd. (Fairvern Nursing Home), (Respondent).(*Withdrawn*).

**0432-85-U:**Ron Bradt, (Complainant) v. CUPE Local 233, (Respondent).(*Withdrawn*).

**0435-85-U:**International Woodworkers of America, (Complainant) v. Melnor Manufacturing Ltd., (Respondent).(*Withdrawn*).

**0443-85-U:**Labourers' International Union of North America, Local 247, (Complainant) v. Dustbane Enterprises Limited, (Respondent).(*Withdrawn*).

**0444-85-U;0620-85-U:**Labourers' International Union of North America, Local 183, (Complainant) v. Creson Investments Limited and/or Fairfield Management Inc. and/or Fairfield Management Limited and/or Montevideo Limited Partnership and/or Montevideo Park Ltd.

Partnership and/or The South Shore Ltd. Partnership and/or Lakeview Limited Partnership and/or Glen Erin Acres Ltd. Partnership, (Respondents); Labourers' International Union of North America, Local 183, (Complainant) v. Creson Investments Limited and/or Fairfield Management Inc. and/or Fairfield Management Limited and/or Montevideo Limited Partnership and/or Montevideo Park Ltd. Partnership and/or The South Shore Ltd. Partnership and/or Lakeview Limited Partnership and/or Glen Erin Acres Ltd. Partnership and/or 478182 Ontario Limited, South Shore Limited Partnership - Societe En Commandite South Shore, (Respondents).(*Withdrawn*).

**0458-85-U:**United Steelworkers of America, (Complainant) v. Ram Partitions Division of Indal Limited, (Respondent).(*Withdrawn*).

**0459-85-U:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) and its Local 199, (Complainant) v. N.E.T.P. Limited and Fritz Draxlmaier, (Respondents).(*Withdrawn*).

**0472-85-U:**Labourers' International Union of North America, Local 183, (Complainant) v. Canada's Capital Building Services Ltd., T. Zigoumis, J. Zigoumis, C. Zigoumis and Gus Zigoumis, Manuel Gomes and Eduardo De Sousa, (Respondents).(*Withdrawn*).

**0512-85-U:**International Union of Operating Engineers, Local 793, (Complainant) v. Leo Alarie & Sons Limited, (Respondent).(*Withdrawn*).

**0522-85-U:**Ontario Public Service Employees Union, (Complainant) v. Pembroke and District Association for the Mentally Retarded, (Respondent).(*Withdrawn*).

**0524-85-U:**United Plant Guard Workers of America Local 1982, (Complainant) v. York University, (Respondent).(*Withdrawn*).

**0527-85-U:**United Brotherhood of Carpenters and Joiners of America, Local 2679, (Complainant) v. Eureka Coach Company Limited, (Respondent).(*Withdrawn*).

**0542-85-U:**International Brotherhood of Electrical Workers, Local 353, (Complainant) v. Corporation of the City of Toronto, (Respondent).(*Withdrawn*).

**0547-85-U:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Sunkist Fruit Markets Toronto Limited, (Respondent).(*Withdrawn*).

**0561-85-U:**Lutaf Sunderji, (Complainant) v. U.A.W. Local 1967, McDonnell Douglas Canada Ltd., (Respondent).(*Withdrawn*).

**0562-85-U:**Raymond Joseph Samson, (Complainant) v. Guardian Glass Ltd., (Respondent).(*Withdrawn*).

**0581-85-U:**International Woodworkers of America, (Complainant) v. Lajambe Forest Products Limited, (Respondent).(*Withdrawn*).

**0589-85-U:**Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Tricil (Sarnia) Limited, (Respondent).(*Withdrawn*).

**0595-85-U:**Ray Moss, (Complainant) v. 591193 Ontario Ltd. (Robran), (Respondent). *(Dismissed)*.

**0596-85-U:**Dale Boyce, (Complainant) v. 591193 Ontario Ltd. (Robran), (Respondent). *(Dismissed)*.

**0601-85-U:**Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261, (Complainant) v. Fernando Cagigal, Manager The Mill Dining Lounge, (Respondent).*(Withdrawn)*.

**0613-85-U:**United Steelworkers of America, (Complainant) v. Colortron Photo Services Ltd., (Respondent).*(Withdrawn)*.

**0634-85-U:**MacDonald Steel (1976) Limited, (Complainant) v. United Steelworkers of America, (Respondent).*(Withdrawn)*.

**0642-85-U:**Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), (Complainant) v. The Globe and Mail Division of Canadian Newspapers Company Limited, (Respondent).*(Withdrawn)*.

**0652-85-U:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Complainant) v. Dominion General Mfg. Ltd., (Respondent). *(Withdrawn)*.

**0660-85-U:**Hotels, Clubs, Restaurants & Taverns Employees' Union, Local 261, (Complainant) v. Fernando Cagigal, General Manager, The Mill Dining Lounge, (Respondent). *(Withdrawn)*.

**0663-85-U:**Canadian Union of Public Employees, (Complainant) v. Corporation of the County of Lambton, (Respondent).*(Withdrawn)*.

**0728-85-U:**United Food & Commercial Workers Union, Local 633, (Complainant) v. Union Kosher Sausage Company (Chicago 58), (Respondent).*(Withdrawn)*.

**0739-85-U:**Balbir Singh, (Complainant) v. Glengerry Industries, 250 Norfinch Dr., Downsview, Ontario, (Respondent).*(Withdrawn)*.

**0775-85-U:**Gregory Royce Steinke, (Complainant) v. Shearmet Recycling, (Respondent). *(Withdrawn)*.

**0850-85-U:**Ken Lloyd Marshall, (Complainant) v. Bancroft Newman, (Respondent). *(Withdrawn)*.

**0927-85-U:**Linda Pries, (Complainant) v. Ontario Nurses' Association, (Respondent). *(Withdrawn)*.

**3009-85-U:**George O. Montgomery, (Complainant) v. Local 616, Amalgamated Transit Union, (Respondent).*(Withdrawn)*.



## APPLICATIONS FOR CONSENT TO PROSECUTE

**0473-85-U:**Labourers' International Union of North America, Local 183, (Applicant) v. Canada's Capital Building Services Ltd., Manuel Gomes and Eduardo De Sousa, (Respondents).(*Withdrawn*).

## APPLICATIONS FOR RELIGIOUS EXEMPTION

**2931-84-M;2932-84-M:**Mary Geyer, (Applicant) v. Ontario Public Service Employees Union, (Respondent Trade Union) v. Niagara South Board of Education, (Respondent Employer); Mrs. Barbara Jannis Hall, (Applicant) v. Ontario Public Service Employees Union, (Respondent Trade Union) v. Niagara South Board of Education, (Respondent Employer).(*Granted*).

**0629-85-M:**Martin Riess, (Applicant) v. Service Employees International Union, (Respondent Trade Union) v. C.S.L. Services Group, (Respondent Employer).(*Granted*).

## JURISDICTIONAL DISPUTES

**2611-84-JD:**OPEC Acoustics & Drywall Ltd., (Complainant) v. Labourers' International Union of North America, Local 837 and United Brotherhood of Carpenters and Joiners of America, Local 18, (Respondents).(*Withdrawn*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**2552-84-M:**Kingston General Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent) v. Group of Employees, (Interveners).(*Withdrawn*).

**3136-84-M:**Canadian Union of Public Employees, Local 1140, (Applicant) v. Golden Manor, (Respondent).(*Withdrawn*).

**3501-84-M:**Ontario Nurses' Association, (Applicant) v. Campbellford Memorial Hospital, (Respondent).(*Withdrawn*).

**0120-85-M:**Canadian Employment and Immigration Union, (Applicant) v. Office & Professional Employees' International Union Local 225, (Respondent).(*Dismissed*).

**0946-85-M:**Canadian Union of Public Employees, Local 101, (Applicant) v. The County of Middlesex, (Respondent).(*Withdrawn*).

**0947-85-M:**Ontario Nurses' Association, (Applicant) v. Campbellford Memorial Hospital, (Respondent).(*Withdrawn*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**2154-83-OH:** Murray Strong, (Complainant) v. General Motors of Canada Limited and Ron Broad, (Respondents). (*Dismissed*).

**0482-85-OH:** Energy and Chemical Workers Union Local 41, (Complainant) v. Ralston Purina Canada Inc., (Respondent). (*Withdrawn*).

**0492-85-OH:** Christian Buysse, (Complainant) v. Transport Driver Services Paul Bates, (Respondent). (*Withdrawn*).

**0570-85-OH:** Paul D. Hutchcroft, (Complainant) v. Electrical Contacts Limited, (Respondent). (*Withdrawn*).

**0636-85-OH:** Dennis France, (Complainant) v. Ron Etherington & Inglis Ltd., (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**1257-84-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Violin Railroad Construction Company Limited, (Respondent).(*Withdrawn*).

**2114-84-M:**United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. J.R. Noel Plastering Ltd., (Respondent) v. Trustees, Local 2041 Vacation Pay Trust Fund, Health and Welfare and Pension Plan, (Intervener).(*Granted*).

**2389-84-M:**Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. 357030 Ontario Limited, carrying on business under the name and style of Royal Tile Company, (Respondent).(*Granted*).

**2409-84-M:**Labourers' International Union of North America, Local 837, (Applicant) v. OPEC Acoustics & Drywall Ltd., (Respondent).(*Withdrawn*).

**2438-84-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. 411150 Ontario Limited c.o.b. as Eteo Steel, Eteo Steel Tank Erectors Ltd., (Respondent).(*Granted*).

**2535-84-M:**Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 527 and Labourers' International Union of North America, Local 247, (Applicant) v. Olivieri Masonry Limited, Ottawa-Carleton Bricklaying and Masonry Limited, Olivieri Forming Ltd., (Respondents).(*Granted*).

**2806-84-M:**Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Mandic Bros. Drywall and Construction Ltd., (Respondent).(*Withdrawn*).

**2871-84-M:**Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 4, (Applicant) v. Falls Masonry Contractors, c.o.b. as Falls Masonry Ltd., (Respondent).(*Granted*).

**3093-84-M:**Labourers' International Union of North America, Local 1059, (Applicant) v. Conview Forming Limited, (Respondent).(*Granted*).

**3401-84-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Border Cities Wire & Iron Limited, Peat Marwick Limited c.o.b. as Border Cities Wire & Iron Limited, (Respondent).(*Granted*).

**3447-84-M:**International Association of Bridge, Structural and Ornamental Ironworkers, (Applicant) v. Ontario Hydro, (Respondent).(*Granted*).

**0261-85-M:**Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Lisi Brothers Construction Limited, (Respondent).(*Withdrawn*).

**0327-85-M:**International Union of Elevator Constructors, Local 90, (Applicant) v. Otis Elevator Company Limited, (Respondent).(*Withdrawn*).



**0377-85-M:**Ontario Sheet Metal Workers Conference and Sheet Metal Workers International Association, Local 235, (Applicant) v. Riverside Sheet Metal Limited, (Respondent).(*Granted*).

**0378-85-M:**Ontario Sheet Metal Workers Conference and Sheet Metal Workers International Association, Local 473, (Applicant) v. Giffin Sheet Metal Limited, (Respondent).(*Withdrawn*).

**0379-85-M:**Ontario Sheet Metal Workers Conference and Sheet Metal Workers International Association, Local 473, (Applicant) v. A.G. Baird Limited, (Respondent).(*Withdrawn*).

**0489-85-M:**Labourers' International Union of North America Local 183, (Applicant) v. Tru-Wall Group Limited, (Respondent).(*Granted*).

**0515-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Guy F. Atkinson Holdings Ltd., carrying on business under the name and style of Commonwealth Construction Company, (Respondent).(*Withdrawn*).

**0611-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Amphitron Construction Limited, (Respondent).(*Granted*).

**0612-85-M:**International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. West York Construction Limited and West York Construction (1984) Limited, (Respondents).(*Granted*).

**0706-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Bre-Ex Limited, (Respondent).(*Granted*).

**0709-85-M:**United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Zentil Plumbing & Heating Ltd., (Respondent).(*Withdrawn*).

**0713-85-M:**International Association of Heat and Frost Insulators & Asbestos Workers, Local 95, (Applicant) v. Niagara Peninsula Insulation Limited, Key Insulation Limited, 597457 Ontario Ltd. c.o.b. as Hamilton Insulation Services, (Respondents).(*Granted*).

**0714-85-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Anese Steel Limited, (Respondent).(*Withdrawn*).

**0715-85-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Carlesimo Steel Limited, (Respondent).(*Withdrawn*).

**0716-85-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Cem-al Erectors Limited, (Respondent).(*Withdrawn*).

**0717-85-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Agip Structural Steel Limited, (Respondent).(*Withdrawn*).

**0723-85-M:**Resilient Floorworkers, Local Union 2965, (Applicant) v. 462408 Ontario Ltd., (Respondent).(*Withdrawn*).

**0725-85-M:**International Brotherhood of Electrical Workers, Local Union 353, Member of I.B.E.W., C.C.O., (Applicant) v. L.G. Barrett Electric Ltd., 140 Finchdene Square, Unit 2, Scarborough, Ontario, M1X 1B1, (Respondent).(*Withdrawn*).

**0726-85-M:**International Brotherhood of Electrical Workers Local Union 353, Member of I.B.E.W., C.C.O., (Applicant) v. Agnew Electric, (Respondent).(*Granted*).

**0727-85-M:**International Brotherhood of Electrical Workers Local Union 353, Member of I.B.E.W., C.C.O., (Applicant) v. Agincourt Electric, (Respondent).(*Granted*).

**0772-85-M:**International Brotherhood of Electrical Workers Local Union 353, (Applicant) v. Simplex Electric, (Respondent).(*Withdrawn*).

**0799-85-M:**Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7, (Applicant) v. DMA Masonry Limited, (Respondent).(*Granted*).

**0803-85-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Great Lakes Fabricating Limited, (Respondent).(*Granted*).

**0810-85-M:**Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ellis-Don Ltd., (Respondent).(*Withdrawn*).

**0811-85-M:**The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Goodfellow and Dougherty Ltd., (Respondent).(*Withdrawn*).

**0812-85-M:**United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Di Marco Plumbing & Heating Co. Ltd., (Respondent).(*Granted*).

**0823-85-M:**International Brotherhood of Electrical Workers Local Union 353, (Applicant) v. Gemine Electric Company Limited and/or Electrix (1984) Company and/or 618830 Ontario Limited c.o.b. as R.L.D. Electric Gemini Electric Company Limited and Electrix (1984) Company and 618830 Ontario Limited c.o.b. as R.L.D. Electric as joint employers, (Respondent).(*Withdrawn*).

**0834-85-M:**The International Brotherhood of Painters and Allied Trades, Local 1904, (Applicant) v. Earl Ault Limited, (Respondent).(*Withdrawn*).

**0845-85-M:**The International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario, on its own behalf and on behalf of the International Brotherhood of Electrical Workers Local Union 1788, (Applicant) v. The Electrical Power Systems Construction Association (EPSCA) and Ontario Hydro, (Respondent).(*Withdrawn*).

**0858-85-M:**Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Kozlov Drywall, (Respondent).(*Withdrawn*).

**0867-85-M:**Local Union 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ottawa Door Consultants Ltd., (Respondent).(*Withdrawn*).

**0883-85-M:**Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. G. Tonus Masonry, (Respondent).(*Withdrawn*).

**0913-85-M:**United Brotherhood of Carpenters & Joiners of America, Local 38, (Applicant) v. Donn-Hope Construction Ltd., (Respondent).(*Withdrawn*).

**0919-85-M:**Quality Control Council of Canada, (Applicant) v. Unique Detection Services Ltd., (Respondent).(*Granted*).

**0920-85-M:**Quality Control Council of Canada, (Applicant) v. 3A Quality Inspection Services Ltd., (Respondent).(*Granted*).

**0929-85-M:**The Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 27, (Applicant) v. Pullano Carpentry Co. Ltd., (Respondent).(*Withdrawn*).

**0977-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. Stu-Cor Construction Ltd., (Respondent).(*Dismissed*).

**0995-85-M:**Teamsters Union Local 91, (Applicant) v. Dufresne Piling Company (1967) Ltd., (Respondent).(*Withdrawn*).

## **APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION**

**0330-84-M:**Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. M. Alzner Contractors Ltd., (Respondent).(*Denied*).

**1196-84-U:**The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, on its own behalf and on behalf of Giancarlo Cesaroni, (Complainants) v. R.L. Coolsaet of Canada Limited, (Respondent).(*Denied*).

**0471-85-R:**Ontario Public School Teachers' Federation, (Applicant) v. Scarborough Board of Education, (Respondent).(*Denied*).





*Ontario Labour Relations Board,  
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Toronto, Ontario  
M7A 1V4*

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

September 1985



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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1985] OLRB REP. SEPTEMBER**

**EDITOR: NIMAL V. DISSANAYAKE**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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## CASES REPORTED

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**0582-85-R** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., Applicant, v. **A. G. Simpson Company Limited**, Respondent, v. Simpson Plant Council, Intervener

Certification - Practice and Procedure - Representation Vote - Union Successor Status - Dispute as to intervener's right to appear on ballot in pre-hearing displacement vote - Whether intervener having bargaining rights as union successor - Board procedure where union successor issue arising in other proceeding - Claimant required to provide basis for claim of successor status - Employees, employers and affected union entitled to notice and participation

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *I. M. Stamp* and *B. L. Armstrong*.

### **DECISION OF THE BOARD;** July 5, 1985

1. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken.

2. In accordance with its usual practice, the Board by order dated June 12, 1985, appointed a Labour Relations Officer to examine the records of the applicant and of the respondent and to confer with the parties as to the description and composition of an appropriate bargaining unit, the description and composition of the voting constituency, the list of employees as of the terminal date for the purposes of any vote which might be directed and other matters relating to entitlement to and arrangements for such a vote.

3. The officer so appointed met with representatives of the parties on June 24, 1985. From her report, it appears to be common ground that the employees affected by this application are covered by a collective agreement dated July 6, 1982, which expires August 1, 1985 and covers

all employees of the company at Port Perry, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.

The parties agree that those words describe the unit of employees of the respondent appropriate for collective bargaining in this application.

4. The original parties to the aforesaid collective agreement were 513487 Ontario Limited and Comco Employees' Association. It is common ground that the respondent A. G. Simpson Company Limited is the successor of 413487 Ontario Limited and bound by the terms of its agreement with Comco Employees' Association, presumably by virtue of some transaction to which section 63 of the Act would apply.

5. In paragraph 5 of its intervention dated June 18, 1985, the intervener Simpson Plant Council claims that:

Simpson Plant Council is the successor of Comco Employees' Association within the meaning of Section 62 of The Labour Relations Act pursuant to an agreement dated April 25th, 1985.



At the meeting with the officer, the intervener claimed to be an incumbent trade union entitled to have its name appear on the ballot in any pre-hearing representation vote which the Board might conduct. The applicant denied that the intervener was successor to the bargaining rights held by Comco Employees' Association, which the applicant says still represents the affected employees. The applicant's position was that the names which should appear on any ballot would be its own and that of the Comco Employees' Association.

6. As a result of this dispute, the parties asked that the officer adjourn her meeting without dealing with any of the other matters requisite to the Board's directing a pre-hearing representation vote. All three parties signed a document in the following terms:

By agreement of the parties, the pre-hearing vote meeting will be adjourned until the parties receive direction from the Labour Relations Board regarding whether Comco Employees' Association or Simpson Plant Council is the intervener to appear on a ballot with the applicant.

The officer invited the parties to address written representations to the Board on this issue by July 2, 1985, and adjourned her meeting in accordance with the parties' agreement.

7. On July 2, 1985, the Board received written submissions on behalf of two parties. Counsel for the intervener filed a two-page letter and supporting documentation outlining the material facts on which it bases its claim to successor status. Counsel for the applicant filed a six-page letter acknowledging receipt from the Board of a copy of the Intervention, and responding to the claim set out in it. The following extracts from that letter reflect the positions taken therein:

...It is the applicant's position that the intervention is irregular in that it states that the intervener is a trade union or council that is the bargaining agent of employees affected by this application and that the [Simpson Plant] Council is the successor of Comco Employees' Association (the Association) within the meaning of Section 62 of the *Labour Relations Act* (the Act). It is submitted that the Registrar should settle the form of the ballot in the pre-hearing vote as set forth in Rule 68(b) of the *Rules of Procedure*.

The applicant submits that the two-way vote must be between the U.A.W. and the Association for reasons outlined below. The applicant also requests that the pre-hearing vote be held without delay and that any issue as to the interveners successor rights be determined at a hearing after the pre-hearing vote.

• • •

... the issue of which names appear on the ballot ought logically to be settled before the vote takes place. That issue does not readily allow itself to be resolved by segregating ballots as in other situations.

• • •

... the purported merger between the Council and the Association is invalid in that the Association's constitutional provisions were not complied with respecting notice to amend the constitution of the Association and to provide for its dissolution and merger with the Council...

• • •

if the Registrar were to settle the form of the ballot by allowing the Council to appear thereon would [sic] in effect, at least in the minds of the employees concerned, confer a status on the Council that it arguably does not enjoy...

This letter refers at length to the Board's approach to issues of trade union status when they arise in pre-hearing vote certification applications and other circumstances. It does not appear from the officer's report that there was any challenge to the proposition that both Comco Employees' Association and Simpson Plant Council are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. In that connection, we note that each of those entities has been found to be a trade union in previous proceedings before this Board. Counsel for the applicant approaches the question of which trade union shall be treated as incumbent and placed on any ballot as though this were a question to be settled by the Registrar under section 68(b) of the Rules. That section does not come into play until the Board directs that a pre-hearing representation vote be conducted. No such direction has been made. The Board does not normally direct the conduct of a pre-hearing representation vote until a Labour Relations Officer has met with the parties, reviewed with them all of the matters referred to in paragraph 2 of this decision, and reported to the Board thereon. In this case, the officer has not dealt with all the necessary matters; her meeting for that purpose was adjourned at the request of *all* parties, including the applicant.

8. All parties, including the applicant, requested that the Board resolve the identity of the incumbent whose name would appear on any ballot, before conducting any vote. It is not apparent to us how we could answer that question without resolving Simpson Plant Council's claim to be successor to the statutory rights and obligations of Comco Employees' Association. Indeed, despite her submission that the successorship issue should be dealt with after a vote, counsel for the applicant devoted a good deal of her letter to a review of the Board's jurisprudence on section 62 and to the proposition that there has been no valid merger of the Council with the Association. Counsel for the applicant makes no reference to the parties' meeting with the officer or to the agreement they made at that meeting. The necessary result of that agreement, in our opinion, is that the successorship claim must be dealt with before the officer's meeting resumes. Whatever might have been the case had there been no such agreement, the question at hand at *this* stage in *this* case is not *whether* the Board will deal with the successor rights issue as a preliminary matter, but only *how* it will do so.

9. Section 62 of the *Labour Relations Act* provides:

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

Sections 19 to 22 of the Board's Rules of Procedure provide:

19. An application for a declaration concerning the status of a successor trade union shall be made in quadruplicate in Form 22.

20.-(1) The Registrar shall serve a copy of the application and a notice of application in Form 23 upon,

- (a) the respondent;
- (b) the trade union named in the application as the predecessor trade union; and
- (c) the employer where the respondent named in the application is a person other than the employer.

(2) The registrar shall serve the employer with an appropriate number of notices of application in Form 24 for posting.

21. A respondent, a trade union or an employer served under section 20 shall file a reply in quadruplicate in Form 25 not later than the terminal date for the application.

22.-(1) Where a party requests a hearing by the Board of an application under section 19, he shall set out in the application or reply, as the case may be, a concise statement of,

- (a) the material facts upon which he proposes to rely at the hearing;
- (b) the relief to which he claims to be entitled by reason of such facts; and
- (c) the submissions he proposes to make in support of a claim for relief.

(2) Any employee or group of employees affected by an application under section 19 who desires to make representations in opposition to the application shall file a statement of desire as prescribed in Form 24 not later than the terminal date for the application.

(3) Where no reply has been filed as required by section 21 and no statement of desire to make representations has been filed in the form and manner required by subsection (2), or any such reply or statement that has been filed does not state that a party, employee or representative of a group of employees desires a hearing before the Board, the Board may dispose of the application upon the material before it without further notice to any party or to the employees.

(4) Where a party or an employee or the representative of a group of employees requests or the Board directs a hearing, the registrar shall serve each of the parties and each such employee or representative of a group of employees with a notice of hearing in Form 8.

10. What has arisen here is a question of the sort contemplated by section 62 of the Act. It might be debated whether sections 19 through 22 of the Board's Rules of Procedure must be complied with when the claim to a declaration of successor rights arises in the course of an existing proceeding rather than in a separate application. In our view, it is not necessary to resolve that debate in the abstract. If those sections do not apply to the resolution of questions of successorship which arise in the course of existing proceedings, then the Board is still obliged to fashion a procedure in those circumstances and, in our view, ought to ensure that the procedure it adopts accomplishes the objects addressed by sections 19 to 22 of the Rules. On the other hand, if those sections do apply to questions of successorship which arise in existing proceedings, then it is still open to the Board to modify the approach provided for in the Rules in order to reflect the circumstances in which the issue arises. In either event,



then, when a question of trade union successorship arises in an existing proceeding, the Board both can and should follow a procedure which needs the substantive requirements of Rules 19 to 22 which are, in essence, that the proponent of the successorship claim give the Board notice of all the facts and circumstances on which it is based and that the Board ensure that employees in each affected bargaining unit, their employer(s) and the alleged predecessor and successor trade unions all have notice of that claim and an opportunity to be heard before the Board determines the issue.

11. In the circumstances, the Board directs as follows:

- (1) The letter of July 2, 1985 to the Board from counsel to the Board shall be treated as though it were an application filed in accordance with section 19 of the Board's Rules of Practice affecting the bargaining unit of employees of the respondent described in paragraph 3 of this decision.
- (2) The Registrar shall fix a terminal date with respect to the Intervener's application.
- (3) Rules 20 to 22 shall apply to the intervener's application, *mutatis mutandis*. The necessary changes to Forms 23, 24 and 25 include the following:
  - (a) The File number shall be as in this application.
  - (b) The words "IN A PENDING PROCEEDING" shall be added to the title of proceeding (style of cause) immediately below the words "BEFORE THE ONTARIO LABOUR RELATIONS BOARD".
  - (c) The parties shall be named and designated just as they are in the title of proceeding herein.
  - (d) The word "applicant" in paragraph 1 of each of Forms 23 and 24 shall be changed to "intervener".
  - (e) the words "in this proceeding" shall be added immediately after the word "declaration" in paragraph 1 of each of Forms 23 and 24.
- (4) Because of the substantial likelihood that an oral hearing would be requested by one of the interested parties in these circumstances, and having regard to the Board's concern for expedition in matters involving certification, particularly matters involving pre-hearing representation votes, the Registrar is further directed to *now* schedule a hearing date for the purpose of hearing the evidence and representations of interested parties with respect to the intervener's application under section 62, and to give notice thereof by further amending Forms 23 and 24 as follows:
  - (a) add the words "AND OF HEARING" between the line that ends "SUCCESSOR TRADE UNION" and the line that reads "BEFORE THE LABOUR RELATIONS BOARD" in the title of each form.
  - (b) in form 24 add "and" at the end of subparagraph 4(c), delete "and" at the end of subparagraph 4(d) and delete subparagraph 4(e).
  - (c) add at the end of each form the following three paragraphs:

AND FURTHER TAKE NOTICE that the hearing of the application by the Board will take place at the Board Room, 400 University Avenue, Toronto, Ontario, on .... day, the .... day of ...., 19..., at ....o'clock in the ....noon.

THE PURPOSE OF THE HEARING is to hear the evidence and

representations of the parties with respect to all matters arising out of and incidental to, the application referred to in paragraph 1.

IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

12. In a supplementary letter delivered to the Board July 4, 1985, counsel for the applicant says:

It was and is the applicant's position that the Comco Employee's Association (the Association) and not the Simpson Plant Council (the Council) should appear on the ballot.

Since our last letter of July 2, 1985, however, additional facts have come to light which we believe are relevant in the Registrar's determination on the form of the ballot. It is submitted that these facts speak to an additional reason why the Counsel [sic] ought not to be given status to appear on the ballot.

These "new" facts are said to demonstrate that Simpson Plant Council received employer support in connection with proceedings taken to effect merger between it and Comco Employees' Association, and that an official of Simpson Plant Council intimidated employees during those proceedings. It is apparent on the face of this letter that the facts said to have come to light since July 2, 1985, have been known to the applicant trade union since February, 1985.

13. The pre-hearing vote procedure is meant to enable the conduct of representation votes without having first to hear and determine contentious matters of the kind now raised by the applicant. The applicant's position is that the Board should act on these contentious allegations before a vote is conducted. We would not and could not do so without conducting a hearing. We are left in a serious doubt whether the Board should, in these circumstances, exercise its discretion to direct the conduct of a pre-hearing representation vote. Accordingly, at the hearing which we have directed that the Registrar schedule, the applicant will be required to show cause why the Board should not refuse its request that a pre-hearing vote be conducted.

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**0943-85-R** Hotel Employees Restaurant Employees Union Local 75, Applicant, v. **The Ambassador Building Maintenance Limited**, Respondent, v. Cleary Auditorium and Memorial Convention Hall, Intervener, v. Group of Employees, Objectors

**Employer - Contract for providing janitorial services requiring respondent to provide employees and supervision - Neither employees nor supervision provided by respondent in actual fact - Substance prevailing over form - Respondent not employer of employees**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *R. Swenor* and *H. Kobryn*.

**APPEARANCES:** *B. P. Wilson* and *Ray Fourchette* for the applicant; *R. D. Perkins* and *K. J. Fitzpatrick* for The Ambassador Building Maintenance Limited; *Patrick Brode* and *David Tinning* for Cleary Auditorium and Memorial Convention Hall; no one appearing for the objectors.

# **DECISION OF THE BOARD;** September 18, 1985

1. This is an application for certification.
2. The respondent Ambassador takes the position that it is not the employer of the employees in question, but rather is performing nothing more than a "payroll service" for the actual employer, Cleary Auditorium and Memorial Convention Hall.
3. The respondent has entered into a contract with Cleary Auditorium with respect to the provision of janitorial services at the auditorium. That contract is not in the respondent's standard form, but rather was drafted by Cleary Auditorium, and provides in particular:
  1. The Committee [of Trustees of the Cleary Auditorium] hereby covenants and agrees that the Supplier [Ambassador] will have the right to supply labour for janitorial services, window cleaning and furnishings placement as authorized by Auditorium Management...
  5. The Supplier hereby covenants and agrees to provide janitorial service within the hours and conditions as set by the Manager of the Cleary Auditorium and Memorial Convention Hall hereinafter referred to as the Manager, and to provide the number of employees and hours of labour as directed by the Manager, together with supervision as may be required, and to maintain the premises of the Cleary Auditorium and Memorial Convention Hall to the complete satisfaction of Management, all in accordance with the terms of this Agreement.
4. Notwithstanding paragraph 5, however, the facts are that Ambassador has at no time provided either employees or supervisors with respect to the performance of janitorial work at the Cleary Auditorium. Rather, all employees have been hired directly by Cleary, through application forms on the letterhead of the Cleary Auditorium, and all aspects of the employees' working conditions, including supervision of the employees themselves, have rested solely with management of the Cleary Auditorium. Every second Thursday Ambassador receives a telephone call from the Cleary Auditorium advising them as to which employees are to be paid for that pay period, and how much. Ambassador then prepares the payroll cheques, subject to the usual payroll deductions, and makes them available for pick-up by Cleary Auditorium, who then distributes them to the employees. At the request of Cleary, the



employees are also subject to a benefit plan which Ambassador has established, not for its own cleaning employees in the city, but rather for its management personnel. Ambassador has no other involvement with the employees being employed to perform the janitorial work at the Auditorium, nor has it ever had any direct contact with those employees. In light of those facts, disclosed before the Board, the applicant acknowledges that it would appear to be the Committee of Trustees of the Cleary Auditorium and Memorial Convention Hall with respect to whom it ought to have applied for certification.

5. The Board agrees. We note, to begin with, that paragraph 1 of the contract simply provides for the "right" of the supplier to supply labour for janitorial services "as authorized by Auditorium Management", without indicating that it in fact has ever been authorized or required to do so. That unusual wording, together with the broad overriding powers granted to the management of the Cleary Auditorium in paragraph 5, appears to raise an ambiguity with respect to this point on the face of the document itself. But whether or not that is the case, the Board has made clear in innumerable cases, in dealing with the issue of the "true employer", that "substance" must govern over "form", and that the two potential employing parties cannot, by virtue of the form of the contract between them, bind a third party to the determination of who the "true employer" is. See, e.g. *Kennedy Lodge*, [1984] OLRB Rep. July 931. In this case the question of who the true employer is for the purposes of an application for certification is unequivocally determined by the actual manner in which employees have been hired, supervised, and had their working conditions set, and that employer is Cleary Auditorium and Memorial Convention Hall.

6. The application brought with respect to Ambassador Building Maintenance Limited is accordingly dismissed.

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**0286-85-U David T. Balint, Complainant, v. U.A.W. Local #444, Respondent, v. Chrysler Canada Ltd., Intervener**

**Duty of Fair Representation - Unfair Labour Practice - Union settling grievor's discharge grievance - Negotiating pension beyond entitlement under collective agreement - No automatic right to have discharge grievance arbitrated - Union motivated by grievor's best interest - No violation**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *I. M. Stamp* and *S. O'Flynn*.

**APPEARANCES:** *Anne Balint* and *David Balint* for the complainant; *Jim O'Neil*, *Ken Gerard*, *David Wilson*, *M. J. Rankin*, *Eric Holt* and *Pat McNamara* for the respondent; *David Deluzio* for the intervener.

**DECISION OF THE BOARD;** September 9, 1985

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the

complainant has been dealt with by the respondent trade union contrary to the provisions of section 68 of the Act. Section 68 provides:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

2. The complainant, Dave Balint, until his discharge in June of 1984, had been a millwright in the employ of the intervener Chrysler Canada for some 25 years. Reference was made in evidence to a considerable number of disciplinary incidents on the complainant's record, but no party sought to rely on those with respect to the issue before us, and no more precise statement of those incidents, or the respondent Union's role in mitigating the complainant's penalty with respect to any of them, is before the Board. Shortly before the events leading to the discharge here in question, the complainant had been assured by a number of management personnel, including the shift foreman Mr. Seguin, that persons in the classification of electrician would play no part in the performance of certain work normally assigned to millwrights. On the evening of Saturday, June 9th, however, the complainant observed two electricians carrying out work in a way that he considered a breach of that undertaking, and he became very upset. He is alleged by the company to have gone to Mr. Seguin's office and threatened him with physical assault, and also to have asked for the home number of another management official who had given the undertaking, because he wanted to “take him by the throat”. Mr. Seguin is said to have directed the complainant to go home, until notified by the company to return to the plant, but the complainant refused to leave. Plant security personnel were then summoned to escort the complainant from the premises, but the complainant insisted that he would leave only if arrested by the Windsor Police. The Windsor Police were thus summoned, and asked the complainant to leave with them under his own power. The complainant stated, however, that he would leave only if taken out in handcuffs, because he wanted the media to see how he was being treated. The Police finally obliged.

3. The next day the Plant Committee, including the Skilled Trades' committeeman, Murray Rankin, met with the company in an effort to head off the complainant's discharge, which, in light of the complainant's most recent suspension of 30 days, was the result they feared. The committee did succeed in persuading the company to settle for another 30-day suspension, and the complainant was summoned to a meeting with the company to be informed of what was proposed. The complainant refused to accept the suspension, however, and became engaged in a heated exchange with the company's Personnel Manager, Mr. Cooper. The complainant left the meeting, and the trade union officials tried to calm Mr. Cooper down. Mr. Cooper ended the meeting indicating that the question of the complainant's discipline was still up in the air. The complainant was told by Mr. Rankin to leave the plant, and that the company had indicated a decision would be made by the following day.

4. The next day the complainant apparently waited outside the plant for a decision to be made about his status, but none was forthcoming. He then began to picket outside the plant gate with a sign making certain comments about Mr. Cooper, and Chrysler Canada in general. The company refused to discuss the complainant's case while the complainant was outside picketing and trying to prevent other employees from reporting for work. Mr. Rankin sent other representatives of the trade union outside to plead with the complainant to leave the matter

to them to deal with in the grievance procedure, but the complainant did not wish to be restrained. Two days later, the respondent trade union was advised that the complainant was being discharged.

5. The respondent immediately filed a grievance for the complainant, and carried the grievance through each stage of the grievance procedure. Through those stages the respondent was made aware that the company had statements against the complainant signed by three management persons alleging to have witnessed the complainant threaten Mr. Seguin in Seguin's office, as well as the statements of Plant Security and the Windsor Police with respect to the complainant's refusal to leave the premises. The respondent's officers who were trying to persuade the company to re-instate the complainant asked the complainant if he could provide them with any evidence to support his own denials. The complainant each time he was asked responded that he had no witnesses because he and Mr. Seguin were alone in Seguin's office, but that he would bring in two elders from his Church, and that he would have the Minister read from the Scriptures, and that whoever had to be carried out was the liar. The respondent's officials explained to the complainant that, on the basis of the available evidence, there was little chance of the respondent successfully obtaining his re-instatement, either through the company or an arbitrator, and implored him to authorize them to seek to negotiate some kind of pension for him, while the opportunity was still there. The complainant in his meeting with the company immediately after the discharge apparently had indicated that it would cost the company \$25,000 to get rid of him, and the respondent's officers tried to demonstrate to the complainant why such an offer was far less beneficial to him than a continuing pension. Finally, the complainant agreed to let them see what they could come up with.

6. The respondent thus approached the company with the idea of a pension for the complainant, and, to keep the matter alive in the meantime, posted his grievance to arbitration. The company was at first unwilling to do anything for the complainant, but finally agreed to the negotiation of a full total disability pension, beyond the terms of the collective agreement. The respondent then put this proposed settlement of his grievance to the complainant, but the complainant, after consideration of it, and in particular the amount he needed to maintain his house and family, indicated he still wanted to take his chances on arbitration.

7. That arbitration had been set for February 15, 1985, and a meeting was arranged with the International Representative who would present it, Mr. O'Neil, on February 13th. All of the evidence that the company had lined up against the complainant was reviewed at that meeting (the company had now brought forward additional witnesses), and the complainant was asked again whether he had been able to come up with any evidence to support his denials. The complainant once again responded that he had been one-on-one in Mr. Seguin's office, but that he was content to have the ritual with the elders performed before the arbitrator, and, again, the one that had to be carried out would be the liar. We gather from the evidence of the complainant that the International Representative responded to the complainant's proposed "defence" with words to the effect that he "wasn't anxious to make a fool of himself in front of the arbitrator".

8. At the same time, it is clear that the respondent's representatives were extremely disturbed by the prospect of the complainant losing his chance at a pension, and tried to persuade him to reconsider on that basis. The complainant, however, was adamant about going to arbitration. The Local's President, Mr. Gerard, accordingly stated to the complainant that



the Union would proceed to arbitration with the case, if the complainant acknowledged in writing that the Union's advice to him was to the contrary, and that he would not come after the Union if the case went to arbitration and was lost. The complainant felt that the request for such an acknowledgment raised a question as to how hard the respondent intended to fight his case at arbitration, and refused to sign such a statement.

9. The respondent's representatives accordingly had to make their own judgment as to how to proceed and decided, on the basis of what they had to work with in arbitration, that it was in their member's own best interest to accept the settlement they had negotiated with the company. At some point that settlement was modified to include the additional provision that any outside earnings of the complainant would not be deducted from his pension benefits (although it is apparent that Chrysler was not prepared to permit the complainant back on company property in the employ of *anyone*). A written memorandum outlining the pension agreement was entered into with the company, and the grievance of the complainant was withdrawn. The complainant was very much opposed to this decision of the respondent, and thus the present proceedings were launched.

10. The only other development that might be noted in this case is that, subsequent to the first day of hearing, the complainant, facing a cut-off of his group-insurance benefits, attended at the company's offices and signed an acceptance of the pension negotiated for him by the respondent. The complainant pressed the company as to whether acceptance of the pension would prevent him from confirming the present proceedings against his trade union, and the company offered the opinion that it would not. The company advised the Board that it had felt duty-bound to honour its agreement with the union, up until the expiry date that had been agreed upon, and did not take the position that the complainant's action rendered his discharge grievance inarbitrable. The complainant indicates that he is prepared to give back the pension if he can succeed at arbitration.

11. Turning to the law with respect to section 68, the present case arises, as do most coming before the Board under that section, out of a decision of the bargaining agent not to proceed with a grievance to arbitration. About this the Board has said in the past, for example in *Antonio Melillo*, [1976] OLRB Rep. Oct. 613 at 615-16:

Most unfair representation complaints arise, as did this one, in the context of a union decision not to carry a grievance to arbitration. It is well established that the duty imposed on a trade union by section 60 (now 68) does not require it to process through to arbitration every grievance which a bargaining unit employee wishes proceeded with. An employee has no absolute right to have his grievance arbitrated (see *Gebbie and Longmoore*, [1973] OLRB Rep. 519.

And in the same vein in *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618 at 624:

It has been the consistent jurisprudence of this Board that it will not second guess a union in its handling of a particular matter and that the section [section 60, now section 68] does not take away a union's right to determine not to proceed to arbitration in a particular case. The Board will, however, examine the union's handling of a grievance to determine whether the complainant has shown that he has been dealt with arbitrarily, in a discriminatory manner or in bad faith.

12. There have been many articulations by the Board of what such an "examination" entails, and one that arose in the context of a discharge grievance provided as follows:

10. ... With respect to the final discharge grievance, it must be borne in mind in considering the duty of fair representation, as the Board has frequently made clear in the past, "an employee has no absolute right to have his grievance arbitrated". See, for example, *Gebbie and Longmoore*, [1973] OLRB Rep. Oct. 519; *Antonio Melillo*, [1979] OLRB Rep. Oct. 613. Rather, it is the function of the Board, in administering the duty, to ensure only that the trade union has fairly "put its mind" to the merits of the grievance, has investigated and considered all of the relevant factors (and no irrelevant ones), and has arrived at a decision which, as evidence of its diligence and good faith, appears neither implausible nor capricious. If a trade union satisfies these minimum requirements under the Act, the decision is the trade union's to make. See *Walter Prinesdomu*, [1975] OLRB Rep. May 444; *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35.

See *Parin Kasmani*, decision of the Board in File No. 2579-81-U, released May 20, 1982.

13. We are all satisfied on the evidence that the respondent trade union has met that standard. The respondent has at all times demonstrated a keen and sincere interest in the welfare of its member, Dave Balint, and was prepared right up to the date of the arbitration hearing to consider any evidence which the complainant could direct them to in order to overcome the combined effect of the company's evidence and the complainant's prior record. While the complainant is not open to any criticism for the religious beliefs which he holds, neither is the respondent for being unwilling to adopt before an arbitrator the unorthodox "truth-seeking" procedure urged upon them by the complainant. The respondent did fairly turn its mind to the chances of the complainant's grievance succeeding, and it was not influenced by any improper considerations in so doing. Rather, we find the respondent to have been motivated solely by what it reasonably perceived to have been in the complainant's best interest, in accepting on his behalf the pension that it had succeeded in negotiating with the company, beyond any entitlement that existed for the complainant under the collective agreement. The respondent having, in our view, more than met the standard imposed upon it by section 68 of the Act, it is not for either the complainant or the Board to direct that the grievance ought to be proceeded with to arbitration.

14. The complaint is accordingly dismissed.

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**0255-85-R** Canadian Paperworkers Union, Applicant, v. **Carlton Cards Ltd.**, Respondent, v. Independent Greeting Card Workers' Union of Canada, Intervener

Certification - Practice and Procedure - Representation Vote - Employer letter to employees indicating employer support for intervener incumbent union - Applicant union using letter to its advantage in campaign - Whether pre-hearing vote held unreliable as a result - Whether new vote directed

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

**APPEARANCES:** *Harold F. Caley* and *Gary Bucella* for the applicant; *Derek L. Rorgers*, *Dieter Plautz* and *Robert Strandon* for the respondent; *Stewart D. Saxe*, *Cheryl Elliott*, *Brad Huxtable* and *John Trigiani* for the intervener.

**DECISION OF THE BOARD;** July 4, 1985

1. The Board delivered the following oral ruling at its hearing on June 28, 1985:

### ORAL RULING

We do not have to hear from counsel for the respondent or from counsel for the applicant who are opposed to the intervener's motion.

The intervener submits that the pre-hearing representation vote directed by the Board in this case that was conducted on May 27, 1985, should be set aside and a new vote be directed on the grounds that the respondent circulated a letter to the employees in the bargaining unit, which letter the applicant incorporated into its own campaign propaganda. The respondent's letter stated:

May 21, 1985

Fellow Employees:

On Monday, May 27th the Ontario Labour Board will conduct a vote among you to permit you to decide whether you want to be represented by

Independent Greeting Card Workers  
of Canada

or

Canadian Paperworkers Union

Your decision in that vote can have a long-time effect upon your future here, and in the future of your families.

Dieter Plautz and I are relatively new at the plant and we are still familiarizing ourselves with the policies and procedures in effect here. We have been attempting to visit with you to discuss your problems.

We are familiar with the fact that about 29 years of representation by the Independent Greeting Card Workers of Canada has resulted in many years of peaceful relationships with no interruption of work because of strikes or other serious disputes.

From what we have been able to learn about the C.P.U. we are seriously concerned that its entry into our business could put an end to the long period of peaceful relations and is not in your best interests.

Dieter Plautz and I ask only that you give us time to prove to you that we have your best interests at heart, and that you can count on us to be fair with you.

The voting will be by secret ballot and all of you should vote so that your choice will be a truly democratic one.

Sincerely,



'Bill Powell'	'D. Plautz'
Bill Powell	Dieter Plautz
President	Director of Personnel''

The applicant, in its campaign propaganda, stated:

**"HAVE YOU HEARD OR READ THE LATEST?"**

In case you haven't, we feel it is important that you do. Therefore, we are attaching a copy of the leaflet being circulated by Mr. Powell and Mr. Plautz of Carlton Cards.

Firstly, we would like to congratulate both Mr. Powell and Mr. Plautz because they have now proven what we have been saying all along. Mr. Trigiani [an official of the intervener] is not only paid by the Company but also supported by it.

Mr. Powell and Mr. Plautz start their letter by saying "Fellow Employee". These are the same two guys that lay you off, keep you as temporary help to deprive you of benefits, issue incident reports, deny your job postings, deny you merit increases and impose unreasonable production standards on you. Now, because they need you for one day, they have the nerve to call you - 'Fellow Employees'.

Mr. Powell and Mr. Plautz say they are concerned about your future and your family's future.

Do they show that same concern when you are collecting U.I.C. on lay-off and they hire new employees to replace you? Do they show that same concern when you have problems and their supervisors abuse and discipline you?

Do they show that same concern when you are denied your rate increase and cannot afford to buy your family the things they need and want? Where is that heart-felt concern when you are ill and receive sick pay for only a meagre seven days?

Mr. Trigiani has gone to them for help because he knows he will lose everything on Monday the 27th. He will lose because he has abused you, the workers. The Company owes John Trigiani because over the years the Company has not given you the wages, the benefits, and the security you deserve. They know now that you have finally seen the light and want fair representation.

The company speaks of supporting the Independent Greeting Cards Workers of Canada. Really, what the Association should be called is "The *Dependent* Carlton Greeting Card Workers".

It is our intention to continue to maintain a long and peaceful relationship with no interruption of work. However, as well, we intend on providing a reasonable and responsible service to you, the workers of Carlton Cards. Something that is absent under the present system.

Mr. Powell states that he is relatively new at the plant and has *your* best interests at heart, and that you can count on him to be *fair* with you. Where has he been for the past two years?

This is obviously an outright *lie*.

Mr. Powell's lack of action has made a mockery out of his words. Why didn't the

Company negotiate a contract with better wages and better working conditions and more security before now - like during the last three months. They could have you know!.

Instead the Company has set negotiations up for June 3 - one week *after* the vote.

Don't be fooled by promises they say will come tomorrow - because tomorrow never comes.

A VOTE FOR C.P.U.

IS A VOTE FOR YOU

Fraternally yours,

M. Hunter'

Michael Hunter''

The intervener submits that the implicit support shown for the intervener by the respondent was the "kiss of death" for the intervener since it would appear to the employees that the respondent is suggesting that they would achieve far more from collective bargaining by being represented by the applicant than by being represented by the intervener, and thus, the intervener argues, would take support away from the intervener.

The interpretation that the intervener places on the respondent's letter is a reasonable one which is the one the applicant used in its own propaganda.

Counsel for the intervener did not submit that the respondent's actions violated section 64 of the Act, nor did he submit that the applicant ought not to be certified by virtue of section 13 of the Act. As we understood his argument, it was counsel's submission that even in the absence of conduct which violates section 64 or triggers section 13, a new vote is needed in this case because the respondent has improperly affected the employees' ability to freely decide whether to be represented by the applicant or the intervener in collective bargaining. We understood counsel to say that the respondent's letter, on its own, would have raised a much weaker objection to the vote, but it was that letter together with the use to which it was put by the applicant that should cause the Board to set aside the vote.

We reject the submissions of the intervener. The respondent's letter on its own cannot reasonably be viewed as affecting the ability of the employees to freely make a decision on which union should represent them. Thus, the issue before us does, in fact, turn on the use of the respondent's letter by the applicant.

The test the Board uses in assessing campaign propaganda in representation votes has been stated as follows in *Crock and Brock Restaurant*, [1984] OLRB Rep. Jan. 19 at page 21:

"As those decision indicate, the Board does not normally interfere with a vote preceded by propaganda which is speculative, exaggerated, misleading or even false. The Board recognizes that in representation votes as in other electoral processes voters must be presumed capable of assessing critically the conflicting arguments often presented by the interests which compete for their votes.

In our unanimous view, the statements here attributed to the union's representatives are not of such a nature that the critical faculties of employee voters would have been overpowered."

See also *Cara Operations Limited*, [1985] OLRB Rep. Feb. 222.

In our view, the ability of the employees to freely decide which union should represent them has not been affected by the propaganda distributed by either the respondent or the applicant in this case.

Thus, the Board is satisfied that the results of the pre-hearing vote can be relied upon by the Board.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board further finds that all plant production employees of the company, except watchmen, group leaders, supervisors, persons above the rank of supervisor, office, clerical and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

5. On the taking of the pre-hearing representation vote directed by the Board, more than fifty-five per cent of the ballots cast were cast in favour of the application.

6. A certificate will issue to the applicant.

7. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

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**0687-85-R** Theresa Lamson, Applicant, v. United Food and Commercial Workers' Union, Local 725, Respondent; (re: Title Distributing Limited carrying on business as **Economy Fair**)

**Practice and Procedure - Termination - Full-time employee filing application to terminate bargaining rights with respect to both full-time and part-time units - Signatories to petition also applicants - Applicant entitled to be nominal applicant for both units**

**BEFORE:** *D. E. Franks*, Vice-Chairman, and Board Members *F. W. Murray* and *B. L. Armstrong*.

**APPEARANCES:** *Teresa Lamson* and *Brian MacPherson* for the applicant; *Norman L. Jesin*, *Frank Kelly* and *Matti McKay* for the respondent; no one appearing for Title Distributing Limited carrying on business as Economy Fair.

#### **DECISION OF THE BOARD;** August 21, 1985

1. This is an application for a declaration terminating the bargaining rights of the respondent made under section 57 of the *Labour Relations Act*. The applicant set out the bargaining unit in the application as follows:

First Floor store location known as Economy Fair Drug Mart located next to A & P store at southwest end of Napanee Mall located at 450 Centre St., Napanee, Ontario, K7R 1P8.

The applicant, Theresa Lamson, is a full-time employee of the employer, Title Distributing Limited carrying on business as Economy Fair ("hereinafter referred to as "Title Distributing Limited"). The respondent and Title Distributing Limited in fact have two collective agreements with the following bargaining units:

##### **Bargaining Unit #1**

All employees of the company in Napanee, Ontario, save and except the pharmacist, the store manager, persons above the rank of store manager, persons employed for not more than twenty-four (24) hours per week, and students employed in off-school hours and during the school vacation period.

##### **Bargaining Unit #2**

All employees of the company in Napanee, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the pharmacist, the store manager, and persons above the rank of store manager.

The petition filed with the application in this matter contains the names of employees falling within both bargaining units.

2. The respondent raised with the Board the issue that the applicant Theresa Lamson is not an employee in the part-time bargaining unit and is therefore not entitled to bring this application given a strict reading of section 57(2):

Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

(b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;

(c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

3. Counsel for the applicant cited a number of decisions where the Board has dealt with the meaning of the phrase “any of the employees in the bargaining unit” in section 57(2) of the Act. The Board has, however, considered this issue in a previous decision, *Cara Operations Limited*, [1984] OLRB Rep. Oct. 1378 not cited by the applicant. In that case the Board faced a similar situation where certain full-time employees were the nominal applicants. The Board reasoned as follows:

The question to be determined is, on the facts before the Board, who is or are the true applicants and whether they are the employees referred to under section 57(2)? The respondent represents both bargaining units of employees of the intervener in two similar but separate collective agreements. The applicants have defined in the application the two bargaining units. The Board was able to make the preliminary counts at the hearing with respect to both bargaining units so as to cause the Board to inquire into the voluntary signification of the employees in writing in support of this application. The statements of desire have been signed by the employees in both bargaining units. While Mrs. Young and Miss Gattwald are the nominal applicants in this application, in our view, when the formal application in Form 17 and the statements of desire are considered together, the application has been made by employees in both bargaining units and employees in both bargaining units have applied for a declaration that the respondent no longer represents them as their bargaining agent. See *St. Michael's Shops of Canada Limited*, *supra*.

We propose to treat the present case in the same way, that is, to consider those employees who are signatory to the petition as applicants as well as Theresa Lamson. Therefore, the respondent's request to dismiss this application as it relates to the part-time unit must fail.

4. The respondent also contended that Theresa Lamson was not an employee in the bargaining unit in that she exercised managerial functions within the meaning of section 1(3)(b) of the Act. The evidence before the Board, however, is clear that although Theresa Lamson

is described as an assistant manager she is not a store manager so as to be excluded by the language of the bargaining unit. Furthermore, although Ms. Lamson did fill in for the store manager for a period of some six months in 1984, it is clear that at the time of this application and for a considerable time before the making of this application her position was that of assistant store manager. Consequently, we are satisfied that she did not exercise management functions such as would exclude her by reason of section 1(3)(b) of the Act.

5. At the hearing in this matter, the Board heard the evidence concerning the origination, preparation and circulation of the petition filed in this matter. On the facts before us, we are satisfied that the petition represents the voluntary wishes of the employees. Accordingly, the Board directs that a representation vote be taken. Those eligible to vote are all employees of the company in Napanee, Ontario, save and except the pharmacist, the store manager, persons above the rank of store manager, persons employed for not more than twenty-four (24) hours per week, and students employed in off-school hours and during the school vacation period (hereinafter referred to as bargaining unit #1) and all employees of the company in Napanee, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the pharmacist, the store manager, and persons above the rank of store manager (hereinafter referred to as bargaining unit #2) on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

6. The voters in bargaining unit #1 and in bargaining unit #2 will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Title Distributing Limited carrying on business as Economy Fair.

7. The matter is referred to the Registrar.

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**1365-85-R** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **Eddie Black's Limited**, Respondent, v. Group of Employees, Objectors

**Certification - Petition - Collector's familial relationship to management not reason by itself to reject petition collected - Whether contact of collector by company headquarters affecting employee perception - One of two collectors approaching employees openly - Only signatures collected by other accepted as voluntary**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *W. H. Wightman*, and *B. L. Armstrong*.

**APPEARANCES:** *Frank Reilly* and *Wayne Robson* for the applicant; *A. P. Tarasuk*; *J. G. Walsh* and *C. King* for the respondent; *C. J. Abbass*, *Bozana Gregoire* and *Edward C. Murray* for the objectors.

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER W. H. WIGHTMAN; September 30, 1985**



1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Regional Municipality of Ottawa Carleton, save and except supervisors, persons above the rank of supervisor and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

For purposes of clarity, the Board notes the further agreement of the parties that the term "supervisor" used above refers to the first line of managerial exclusion, and that that line in the present circumstances is at the level of Store Manager. Assistant Store Managers, as well as employees Ursula Archibald, David Lavigne, Leonard Mullen, and Gytri Nizam are included in the bargaining unit.

4. The applicant filed membership evidence on behalf of 53 employees employed in the bargaining unit as of the date of the application. That represented 64 per cent of its projected unit of 83 persons. The application, however, covers some 13 or 14 stores in the Ottawa municipal area, and the actual number of employees in the bargaining unit as of the date of the application has been determined to be 94. The applicant's cards still represent 56 per cent of that figure, sufficient evidence of support to be certified without a vote.

5. There were, however, timely statements in opposition filed in this matter bearing the signatures of 3 persons who had also signed membership applications for membership in the applicant. If those 3 persons (or even 2 of them) are found to have signed the statement in opposition in circumstances which can be said to be voluntary, the applicant's level of *unqualified* membership support drops below the level required, under the practice of the Board, for certification without a vote.

6. In the present case, the main proponents of the petition against certification were Ted Murray and Bozana Gregoire. Each was disturbed, for his or her own reasons, by the posting of the Notice of Application, and began to consider individually, and then together, what they could do about it. Each of them ultimately went on their own to different stores to attempt to collect, with varied success, signatures on "petitions" which were written up in a form given to Mr. Murray by an experienced labour lawyer.

7. Mr. Murray is the younger brother of the individual who was District Manager for the respondent's Ottawa area until the 1st of this month, and who is now Assistant Sales Manager in Toronto. Mr. Murray was candid in acknowledging that his brother had asked him about rumours of a Union coming into the stores in the past. But he testified that his only discussion of the Union's application on this occasion, prior to his canvassing activity, was with the assistant store manager and another full-time employee in his store. That was on Saturday, September 7th, when the Notice of Application was posted, and, again on the following Monday. Mr. Murray understood from the Notice that employees could oppose the application either individually or as a group, but he was unsure as to what each involved, and which he ought to pursue. By the end of Monday morning, after talking to the employees in his store, to Ms. Gregoire when delivering film to her store, and to 2 other employees in

another store at lunch, Mr. Murray made up his mind to head up opposition to the application in the group or "petition" form.

8. That afternoon, Mr. Murray received a telephone call from someone identifying himself as an employee in the Toronto warehouse, and indicating that he heard Mr. Murray was planning on taking up a "petition" against the Union. The caller went on to say that if Mr. Murray proceeded to do so, he strongly recommended obtaining the advice of a lawyer. He then gave Mr. Murray the name and telephone number of a lawyer in Toronto.

9. The Toronto warehouse is also the location of the company's Head Office, and the Board itself questioned Mr. Murray closely on what he knew about the telephone call from Toronto. Mr. Murray himself, however, appeared to be genuinely puzzled over the call, and did not, we are satisfied from his demeanour, automatically attribute it to management. Mr. Murray indicated that he himself could not figure out how anyone in Toronto could have found out so fast that he was planning a "petition", when he himself had only come to that decision that morning. He testified that he did, however, feel that he needed advice, and after wrongly trying to dial the number he had been given in Ottawa, made contact with the lawyer in Toronto.

10. The involvement of Mr. Murray alone, given his familial relationship to management, in the initiating stage of the petitions which were ultimately circulated calls for careful scrutiny. Yet, as the Board has noted, persons in Mr. Murray's position *are* employees in the bargaining unit, and their rights to participate in the question of Union representation cannot be dismissed automatically. As the Board put it in *Otto's Deli*, [1980] OLRB Rep. Nov. 1673 at 1681:

"We do not think that we should readily draw inferences from the mere existence of a family relationship. In some circumstances, relatives may reasonably be perceived as having a special relationship with the employer which could influence an employee's choice with respect to trade union representation, but we do not think that this is always the case, nor are we prepared to automatically assume that the existence of a family relationship necessarily evidences a community of interest with the employer. It may be that there is a presumption tending in that direction but we are all aware that family relationships do not always exhibit the solidarity which counsel suggests. The involvement of family members is not irrelevant, but it is not the only factor to be considered especially where, as here, the inferences to be drawn from it are unclear. Of equal significance in our view is the general atmosphere prevailing at the work place, and the impact this would likely have on employee perceptions."

In that regard, there does not appear to have been any significant reaction on the part of management at all in this campaign, such as would heighten employee sensitivity.

11. There is, however, the additional factor of the "Toronto contact", and the potential impact of that on employees' perception. Had there been any evidence of general discussion of this contact, as in *Baltimore Aircoil*, [1982] OLRB Rep. October 1387, or of "trading" upon it, as in *Zymaise Company*, [1983] OLRB Rep. Jan. 176, the likelihood of *any* of the signatures on the ensuing petitions being considered voluntary would be highly remote. But there *are* no indications of that taking place, and we are satisfied that even Mr. Murray had made and discussed his decision to circulate a petition before a source of legal advice had been identified to him.

12. Mr. Murray did, in the subsequent circulation of his own copy of the petition,

engage in acts of indiscretion in the open way he approached other employees such as would, in our view, invalidate any of the signatures that he collected. But Ms. Gregoire was much more discreet in the stores that *she* solicited, and much of her activity took place at a time prior to it being likely that word of Mr. Murray's own indiscretions had gotten around. As it happens, the circumstances in which she solicited the only signatures relevant to these proceedings are such as to satisfy the Board that they are the product of voluntary reflection by those employees, as opposed to a concern that Ms. Gregoire was acting as a conduit for management.

13. The applicant's unqualified support being below the level of fifty-five per cent, therefore, the Board, in accordance with its normal practice, directs the taking of a representation vote. All employees in the bargaining unit described in paragraph 3 on the date hereof, who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

14. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

15. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER B. L. ARMSTRONG;**

1. I find the main proponents of the petition against certification Ted Murray and Bozana Gregoire to be working together.

2. They both visited different stores to collect signatures for the petition, it was no secret as to the purpose of their visit to the stores.

3. In paragraph twelve the majority found Mr. Murray had engaged in acts of indiscretion in the way he approached other employees. I find Ms. Gregoire's actions equal to those of Mr. Murray and would find the petition not to be voluntary and would certify the applicant.

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**3483-84-M** Ontario Sheet Metal Workers Conference Sheet Metal Workers' International Association, Local 269, Applicants, v. **E. S. Fox Ltd.**, Ontario Sheet Metal and Airhandling Group, Respondents

**Construction Industry Grievance - Collective agreement providing for mileage allowance calculated from base city to project site - Meaning of "base city" - Whether place of ordinary residence or point of hire**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

**APPEARANCES:** *B. Fishbein*, *L. Lavallee* and *G. Ward* for the applicants; *W. J. McNaughton*, *C. Turner*, *Keith Billings* and *L. Ciaufarani* for the respondents.

**DECISION OF THE BOARD;** September 6, 1985

# I

1. These are two grievances referred to the Board pursuant to section 124 of the *Labour Relations Act*. The first grievance concerns the interpretation of the "travel allowance" provision appearing as Article 17 in the "Kingston Appendix" to the provincial collective agreement. Article 17 spells out how employee travel allowances are to be calculated by unionized employers operating in the Kingston-Belleville area. However, the travel allowance formula found in Article 17 (Kingston) is broadly similar to that found in other appendices applicable in other parts of Ontario. Accordingly, the Board's interpretation of Article 17 may have an impact not only on the respondent *E. S. Fox Ltd.* ("Fox") and other sheet metal contractors operating from time to time in the Kingston-Belleville area, but also on employers operating in other parts of the province. That is why the provincial employer bargaining agency appeared and took carriage of the proceedings on behalf of both Fox and all other unionized employers potentially affected by the Board's interpretation of Article 17. Counsel for Fox indicated that his client was content with that arrangement and, while present at the hearing, did not take an active role.

2. The second grievance is much more specific. It concerns the employment rights of a sheet metal worker named Fred Vanlingen, who has worked for Fox in the past, but, for some time, was disabled and receiving compensation under the *Workers' Compensation Act*. He seeks to return to work on particular terms which Fox resists. The dispute is solely between Fox and one of its former employees. There are no obvious provincial or area ramifications, and counsel for the employer bargaining agency indicated that it had no interest and would take no part in this second grievance.

3. It will be seen that the two grievances are quite unrelated. The first is essentially an interpretation question. There are no facts in dispute, but the result may affect employers other than Fox. In contrast, the second grievance involves only Fox, a single former employee, an entirely different issue, and some dispute as to the facts. Counsel suggested that the Board should deal first with the broader interpretation question, returning to the second grievance if time permitted. That is the procedure which the Board adopted and, as it turned out, because

of the parties' settlement discussions, the second case was not reached and a further hearing may be necessary.

4. The Board's decision on the "travel allowance" grievance is set out below. The Board notes the agreement of the parties that Fox is bound by the provincial collective agreement, and further that, should the Board find that there has been a breach of that agreement, the Board should remain seized in case the parties are unable to work out between themselves the amount of compensation payable to any aggrieved union members.

## II

5. Although the facts are not in issue, it may be useful to set out the contract language which is at the heart of the present controversy. The relevant portions of the agreement are as follows:

### CLAUSE 17 - TRAVEL AND BOARD

**17.1** Free zone boundaries shall be a ten mile radius from City Hall in Kingston, Belleville and Brockville.

**17.2** *Employees based in the Cities of Kingston, Belleville and Brockville, shall provide their own transportation to the shop or job, within the free zone boundaries of their base city and/or base shop. (The preceding shall exclude an on site shop). After the employee goes outside his base city free zone, he shall receive an extra remuneration for Mileage Allowance as shown above to the maximum set out as Board Allowance. The mileage to be calculated starting from City Hall of his base City.*

[emphasis added]

Union members are dispatched from the hiring hall and engaged by employers pursuant to Article 21 of the master portion of the agreement and Article 7.1 of the Kingston appendix:

### ARTICLE 21 - HIRING PROCEDURE

**21.1** The Union hereby agrees to furnish at all times to the employer, duly qualified members and registered apprentices as the work requires, in such numbers as the employer shall determine to be necessary to properly execute the work he has contracted for, in the manner and under the conditions specified in this Agreement.

### CLAUSE 7 - HIRING PROCEDURE

**7.1** The employer shall have the right to engage former employees in the past one year, if available, but otherwise he will accept journeymen or apprentices sent by the local union business manager.

6. Fox is a construction contractor engaged in projects (as the market dictates) throughout the Province of Ontario. Its head office is in Welland. It has a sub-office and shop in Kingston. It has no permanent establishment in or around Belleville. Neither does the union. The union's offices and hiring hall are in Kingston.

7. At the time of the grievance, Fox was working on a job for Proctor and Gamble

in Belleville, Ontario. The job required sheet metal workers. Fox already had in its employ two union members who were Kingston residents and were just completing work on a Fox job in Kingston. They were reassigned to work on the Proctor and Gamble job in Belleville. There was no break in their employment. They have been paid travel allowance from Kingston to the Proctor and Gamble job in Belleville in accordance with the company's interpretation of Article 17.

8. However, the Proctor and Gamble project required a number of sheet metal workers, and the company therefore turned to the union as it was required to do under the terms of the collective agreement. In response, the union supplied qualified members as it is required to do (see Article 21.1 above). First the union referred all available unemployed members residing in Belleville. None of those members would be entitled to travel allowance because the Proctor and Gamble job is within the ten mile "free zone" stipulated in Article 17.1. But the list of unemployed Belleville residents was soon exhausted, and in order to meet the company's needs, the union had to draw upon unemployed members from other places. Most of these members came from Kingston. It is their entitlement to travel allowance which is currently in dispute. The company's position is that, except for the two Kingston residents already in its employ and transferred to Belleville, none of the Kingston residents dispatched from the hiring hall are entitled to mileage allowance for the distance to and from the Kingston area and the Proctor and Gamble project in Belleville. We might note, however, that, while for ease of exposition, we have and will continue to refer to workers claiming travel allowance as "Kingston residents" (where it is agreed most of them come from), there may be some who ordinarily reside in other places whose travel allowance claim might be resolved on a somewhat different basis. The parties were content to put their case on the basis of competing general interpretations. They did not put before us the details of individual employee claims.

9. The respondents' argument (here put by the employer bargaining agency) can be simply stated. In the respondents' submission, an employee's "base city" is not the place where he ordinarily resides but rather *the point at which he is hired and becomes an employee*. The respondents' point out that Article 17.2 of the Kingston appendix refers to "employees", not "members", and maintains that the two are quite different. The respondents refer to Articles 2.6 and 2.8 of the master portion of the agreement (the definition section) which read as follows:

2.6 "employee" means a certified journeyman sheet metal worker or registered apprentice, as well as sheeter/decker, welder, sheeter's assistant, material handler and probationary employee engaged in the sheeting and decking segment of the sheet metal industry; recognized by the local union and employed in the shop or on the job site except as otherwise specifically provided in this Collective Agreement.

2.8 "member" means a certified journeyman sheet metal worker; sheeter/decker, welder, sheeter's assistant and material handler in the sheeting and decking segment of the sheet metal industry, recognized by the local union and employed or eligible to be employed by an employer in the shop or on the job site.

10. The respondents argue that except for the two workers already employed by Fox in Kingston, the aggrieved individuals remained merely "members" until they are actually hired, and that hiring took place when they reported for work *in Belleville*. It is only at that point, the respondents contend, that the "members" became "employees" and, simultaneously, their "base city" became Belleville. Since the Proctor and Gamble job is within ten miles of the Belleville City Hall, no mileage allowance was payable in respect of any travel expenses actually incurred by workers travelling between the job site and their homes in Kingston.



11. It follows, of course, that it is just fortuitous that the company happened to have in its employ two Kingston residents whom it chose to transfer to the job site in Belleville. Had the company chosen to formally terminate their employment in Kingston, they might well have been dispatched through the union hiring hall anyway but, in the respondents' view, would not have been entitled to travel allowance. Conversely, if a manpower shortage on a Kingston job caused an employer to hire a Belleville resident who worked for a time in Kingston, but who was later transferred, without a formal break in employment, to another job in Belleville, he *would* be entitled to travel allowance even though Belleville was his ordinary place of residence. In the respondents' submission, the employees' place of residence or need to travel to work are both irrelevant. The respondents told the Board that the interpretation they urged upon us is one which significantly reduces employees' entitlement to travel allowance and thus an employer's cost. Counsel notes that if the term "base city" is linked to a worker's residence, then an employer's potential labour costs become quite unpredictable and dependent upon whether the project's manpower requirements can be met solely from unemployed local residents. If they cannot, and if the term "base city" is linked to an employee's ordinary place of residence, then the employer faces the costly prospect of subsidizing the travel costs of out-of-town workers. The respondents maintain that they are entitled to minimize their wage costs.

12. We are unable to accept these submissions which, in our view, are inconsistent with a purposive reading of Article 17 of the collective agreement.

### III

13. We may begin by observing that, in the construction industry, work opportunities and employment relationships are necessarily transitory. Contractors move from town to town in accordance with their success in bidding on available jobs. Workers move from place to place and employer to employer as they are dispatched from the union hiring hall in response to employer requests. Typically, there will be no established work place as there is for an employee working in an industrial plant, and workers are required to travel in order to take advantage of available work opportunities. That is why many construction collective agreements include "room and board" or "mileage" allowances to compensate these workers for the costs they would otherwise incur in living away from home or getting to and from work. Given the general purpose of such clauses (including Article 17) it would be curious if, as the respondents submit, entitlement to "room and board" or "travel allowances" was entirely unrelated to whether an employee had to live away from home or travel.

14. We do not doubt that, for some purposes, there may be a significant difference between the rights of a "union member" and the rights of an "employee" (although this agreement sometimes seems to use those terms almost interchangeably), but given the unique context of the construction industry and the institution of the hiring hall, the distinction between an unemployed union member and a prospective employee on the out-of-work list, and a union member dispatched and hired pursuant to the hiring hall's job referral rules, may not be as analytically significant as the respondents' submit. For example, in Article 11.1 of the master portion of the agreement "union members" are entitled to certain time off with pay to perform official duties provided the employer is notified in advance. It is implicit that

the term “union member” here means a “union member” who is also an “employee”. We might also note the decision of the Supreme Court of Canada in *International Longshoremen's Association, Local 273 et al. v. Maritime Employers' Association et al.*, 78 CLLC 14,171, where the Court had before it what was alleged to be an unlawful “strike”. That term was defined in the *Canada Labour Code* as a concerted refusal by *employees*. There, as here, there was a hiring hall provision requiring the union to supply members who, as it turned out, refused to cross a picket line to report for work. The union argued that the subject workers although dispatched, had not reported for work, and therefore, were not, strictly speaking, “employees”. Thus, they could not be engaged in a “strike” as that term was defined. The Supreme Court of Canada commented:

Thus, in a technical sense, the relationship or employer-employee as it is recognized in the common-law, may not arise until the member of the local has reported to the requisitioning member of the association for the work in the port of St. John. Beyond that technical basis, the argument has no merit. . . For the purposes of collective bargaining and labour relationships under the resulting Collective Agreements, *members* of the association and *members* of the Locals were respectively *employers* and *employees* from the onset of the agreements, whatever their rights and obligations may or may not include under the common law of master and servant. . . The *employees* as the term is used in the Collective Agreements herein, are of course the *members* of the Local on whose behalf the Local has undertaken to supply labour to the employer organization and its component members. It cannot be said that the Agreements were designed to operate and in fact operated after the members of the Local's reported to work.

Accordingly, in the collective bargaining context before it, the Court was unwilling to draw a rigid or technical distinction between the rights and obligations of “members” as opposed to “employees”. When union members refused to report for work they were employees engaging in a strike contrary to the terms of the relevant collective agreement even though, technically, the union members had not become “employees” in a common-law sense.

15. In the instant case, we do not think it is necessary to explore the arguable distinction between the terms “member” and “employee”. Nor need we decide whether the employment relationship was established in Belleville when the employees reported for work, or in Kingston because that was the point of dispatch and the employer's office, or whether it would have been established in Kingston had the Kingston residents reported to the Fox office in Kingston and tendered the required documentation. In the Board's view, such artificiality is inconsistent with both the language and clear intent of the collective agreement.

16. Article 17 of that agreement provides for the calculation of a mileage allowance for employees travelling from “their base city” to a shop or job site outside the “free zone” boundary of “their base city” which, in turn, encompasses a ten mile radius from the city hall. In our view, the words “base” or “base city”, used in reference to individual employees for the purpose of calculating mileage allowance, envisage some degree of permanence in a context in which the job site itself will constantly be changing. The words “his base city”, “their base city”, “starting from City Hall of his base city” all suggest that the point of reference is something subjective to the circumstances of the particular employee; and, of course, this is entirely consistent with the notion that employees should, in general, be paid an amount depending upon the miles actually travelled. That, after all, is the purpose of the clause in the first place: it subsidizes workers who must live away from home or travel to the job site.

17. In our opinion, the employee's home base city is the constant - the point of reference

from which one calculates mileage allowance to a job site which may well change from time to time. Employees required to go outside *their* base city receive mileage allowance depending on how far they travel. The base city is the bench mark. We do not accept the respondent's submission that the employees' base city is established by the location of the job site where they report for work, so that entitlement to travel allowance or board allowance has little or no relationship to the distance which an employee must actually travel to get to the job site or whether he actually incurs the expense of living away from home. On the respondents' interpretation, the employees' *base city* may be Kingston today, Belleville tomorrow, and Brockville next week. Moreover, employees actually resident in Kingston and Brockville but travelling different distances to a job site in Belleville would have the same base city and would be entitled to the same mileage allowance: nothing. If they had to live away from the city in which they ordinarily reside, and therefore incurred expenses for room and board, they still would not be eligible because where they report for work would be their (shifting) *base city*. Indeed, as noted, entitlement to the subsidy would have nothing to do with whether they incurred the expenses for which the subsidy was obviously intended; and, by the simple expedient of requiring employees to present their papers at the job site and formally terminating employment after each job, on the respondents' interpretation travel pay could be avoided entirely.

18. We do not think that the respondents' proposed interpretation is consistent with the language, purpose, or intention of Article 17 of the collective agreement. No doubt the respondents' would prefer a situation in which they could totally avoid subsidizing the employees' travel costs, but we do not think that the interpretation urged upon us is the most reasonable one in all the circumstances. We need not decide in this case how particular employees should be designated as "based" in Kingston, Belleville or Brockville (or whether workers not clearly so based have any claim to travel pay at all), since the parties indicated that most of the employee claimants came from Kingston and there was no indication that there would be any problem deciding whether they were properly classified as having a "Kingston" base.

19. For the foregoing reasons, the Board is satisfied that the union's grievance must succeed and that the employee claimants ordinarily resident in the Kingston or Brockville are entitled to mileage allowance calculated starting from the respective city halls of their base cities.

20. In accordance with the agreement of the parties, we shall remain seized in the event the parties are unable to agree upon the amounts (if any) payable to particular employees.

21. The second reference, the "Vanlingen grievance", should be relisted for hearing (if necessary) before another panel of the Board.



**0712-85-JD** International Association of Bridge, Structural & Ornamental Ironworkers, Local 759, Complainant, v. **Horton CBI Limited** and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Respondents

**Jurisdictional Dispute - Practice and Procedure - Sector Determination - Party to jurisdictional dispute proceeding requesting deferment until sector determination - Request refused where not apparent that sector determination assisting determination of jurisdictional complaint**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *I. Stamp* and *R. Wilson*.

**APPEARANCES:** *David Starkman, Ian Anderson* and *Larry Baillie* for the complainant; *Thane P. Woodside* and *Mike Dautovich* for the respondent company; *A. J. Ahee* for the respondent union; *N. L. Jesin* for the Millwrights District Council of Ontario.

**DECISION OF THE BOARD; September 5, 1985**

1. This is a complaint under section 91 of the *Labour Relations Act* relating to the assignment of certain work.

2. It is common ground that the respondent Horton CBI, Limited ("Horton") was awarded a contract for the installation of a barking drum at the Domtar Ltd. mill at Red Rock. Horton assigned the work to members of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (the "Boilermakers union"). By way of this complaint the International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (the "Ironworkers union") seeks a declaration that the work should have been assigned to its members.

3. Members of the Boilermakers union performed the work on the barking drums pursuant to the provisions of a "maintenance" (i.e. non-construction) collective agreement binding on Horton and the Boilermakers union. The Ironworkers union has indicated that it views the work as having been within the industrial, commercial and institutional sector (the "ICI sector") of the construction industry.

4. Horton and the Boilermakers union submit that the Board should defer consideration of the work assignment dispute so as to first allow the Board to decide, pursuant to the provisions of section 150 of the Act, whether or not the work came within the ICI sector. Section 150 provides as follows:

The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

When dealing with an application under section 150, it is the Board's practice to give standing to participate to all trade unions, councils of trade unions, employers and employer organizations that have a connection with the project.

5. In support of their submission that it would be appropriate to defer considering this complaint until after a section 150 determination has been made, both Horton and the Boilermakers union contend that a finding as to whether or not the work came within the ICI sector will influence the type of evidence to be led with respect to both area and employer practice. The Boilermakers union also contends that a finding might affect the weight to be given to “decisions of record” (presumably decisions of the Impartial Jurisdictional Disputes Board) as well as any understandings reached between the two unions since, in its view, these do not apply outside of the construction industry. For its part, the Ironworkers union submits that it is not necessary for the Board to determine what sector the work falls within in that it is seeking a declaration that its members were entitled to be awarded the work regardless as to whether it was ICI construction or non-construction work. The Ironworkers union further contends that to deal with the section 150 issue would unduly delay consideration of its work assignment complaint.

6. If it becomes necessary to characterize the installation of the barking drums as having been ICI construction or non-construction work, then given the possible ramifications of any Board determination on point, we are satisfied that such a determination should be made pursuant to the provisions of section 150 of the Act. However, at this point in time it is far from clear that such a determination will be necessary. The Ironworkers union seeks a declaration with respect to the work regardless of whether it was or was not construction work. Presumably the parties will be leading evidence as to the practice of Horton and other employers in assigning work relating to the installation of barking drums as well as any agreements between the unions or decisions of other tribunals that relate to the installation of barking drums. It appears to us that this evidence will likely be of equal relevance whether the work in question was or was not within the construction industry. In these circumstances, we are of the view that a determination as to whether or not the work came within the ICI sector of the construction industry will not likely be of assistance in deciding the merits of the instant complaint. Given this fact, as well as the possible delays associated with a proceeding under section 150, we are not prepared at this time to defer consideration of the complaint so as to first allow for a determination under section 150. However, if during the course of the hearing into the merits of the complaint, the Board concludes that the issue of whether the work was ICI construction or non-construction may affect the outcome of the case, then the Board can reconsider this decision and, if appropriate, make a determination under section 150.

7. This complaint is to be relisted for hearing in Thunder Bay. This panel is not seized of the merits of the complaint.

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**1651-84-R** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **Joseph Anthony Fine Furniture Ltd.**, Respondent

**Certification - Practice and Procedure - Reconsideration - Termination - Union seeking declaration terminating own bargaining rights - Board treating request as application to reconsider certification - Inviting submissions from employer and employees affected**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *F. W. Murray* and *B. L. Armstrong*.

**DECISION OF THE BOARD;** September 23, 1985

1. On September 24, 1984, the applicant union applied for certification as bargaining agent for the employees of the respondent, Joseph Anthony Fine Furniture Ltd. A hearing in this matter was scheduled to be conducted in Toronto on October 12, 1984. As it turned out, the union and the employer were able to resolve the matters in dispute between them and it was determined that no hearing was necessary. It was not disputed that, at that time, the union had sufficient support to warrant certification as the representative of a bargaining unit framed as follows:

All employees of Joseph Anthony Fine Furniture Ltd. at Windsor, Ontario, save and except managers, persons above the rank of manager, office staff, warehouse staff and cleaning staff.

A certificate to that effect issued on October 12, 1984.

2. By letter dated September 11, 1985, the union wrote to the Board as follows:

On October 12, 1984, the Board certified our union as bargaining agent of employees of the above noted respondent, your file no. 1651-84-R.

It is now evident that we no longer enjoy the support of the employees and we seek a declaration by the Board terminating our bargaining rights.

The Board is prepared to treat this letter as a request for reconsideration and revocation of the certificate issued to the applicant in October, 1984; however, before deciding whether, in the circumstances, it should grant the union's request, the Board considers it appropriate to invite the representations of the employer and the employees who might potentially be affected by such determination. Such representations should be received by the Board, in writing, no later than October 30, 1985 and should specify why the Board should, or should not, grant the union's request to revoke and cancel its certificate - in effect, abandoning its bargaining rights and leaving the employees in the bargaining unit free to deal with their employer, on their own, without trade union representation or intervention.

3. In order to facilitate a resolution of this matter, the respondent is directed to provide a copy of this decision to each of the employees in the bargaining unit and to post a copy (or copies) of the decision in prominent places where they are most likely to come to the attention of the individuals potentially affected by the union's request for reconsideration. Any employee or group of employees potentially affected by the union's request, and desiring to make representations to the Board, should send to the Board a statement of position which



should contain the return address of the employee or representative of a group of employees. Such statement should be sent to the Board by the above-noted date, and should be mailed by *registered mail* addressed to the Board at its office: 400 University Avenue, Toronto, Ontario M7A 1V4. Should the employer or any of the employees request a hearing, such request should also be made in writing. If the Board does not receive any representations from the employer or the affected employees opposing the union's request to revoke its certificate, the Board may accede to the union's request without further notice and without a formal hearing.

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**2099-84-R** Syndicat Quebecois De L'Imprimerie Et Des Communications, Local 145, Applicant, v. **Journal Le Droit**, division du groupe UniMedia Inc., Respondent

**Dependent Contractor - Employee - Whether newspaper delivery drivers dependent or independent contractors - Companion case of Citizen where finding of independent contractor made distinguished - Individuals held to be dependent contractors**

**BEFORE:** *S. A. Tacon*, Vice-Chairman, and Board Members *W. H. Wightman* and *S. O'Flynn*.

**DECISION OF THE BOARD;** September 6, 1985

1. The name of the respondent is amended to read "Journal Le Droit, division du groupe UniMedia Inc."
2. By Board endorsement dated November 24, 1984 a Board Officer was appointed to inquire into and report back to the Board on the list and composition of the bargaining unit. It is the position of the respondent, however, that the individuals for whom the applicant seeks certification are independent contractors.
3. Examinations were held on the respondent's premises in respect of ten of the twenty-six names on the respondent's list. Representing the applicant were C. MacLean, D. Desautels, Y. LeBouthillier, P. Charpentier, G. LeBlanc; for the respondent, were: A. White, C. Legault, D. Deschenes, G. Cabara. The parties agreed that R. Carriere, V. Gardner and Y. Lavigne should be excluded from the bargaining unit in any event. In addition to the ten persons examined, the respondent called two witnesses, Y. Lavigne (for comparison purposes) and F. Belanger (prepare aux camions). Seven exhibits were also entered.
4. The Board Officer advised the parties that, as the evidence of the witness appeared to have the same trend and the parties were not in agreement with respect to representative witnesses, it was appropriate to issue an interim report, rather than proceed with examination of the remaining individuals. The Board, in the context of that interim report and the parties' submissions, would determine whether or not further examinations are necessary. Except as just noted, the parties were afforded full opportunity to be heard, to examine and cross examine witnesses and introduce evidence relevant to the issues before the Board Officer.

5. Before the Board, the respondent noted for the record that it wished to hear *viva voce* testimony from additional drivers. The respondent, though, acknowledged that the overall trend of such testimony would be very similar to that already heard, although there would be some variation with respect to the number of hours worked, extra jobs, etc.

6. The parties then proceeded to argument. It is appropriate to note that the parties' attention had been directed to a very recent decision of the Board (differently constituted in part), *The Citizen, a division of Southam, Inc.*, [1985] OLRB Rep. June 819. This decision also dealt with a newspaper operation in Ottawa where the applicant sought certification for a bargaining unit of delivery drivers and the issue was whether the drivers were independent or dependent contractors. In that case, the Board held the individuals were independent contractors. Both parties in the instant certification application couched their arguments primarily in the context of the *Citizen* case.

7. The applicant argued the *Citizen* was to be distinguished. The applicant reviewed the evidence contained in the Board Officer's interim report in the context of the *Citizen* case and enumerated factors which distinguished the two operations and factors which were common. The applicant submitted that some differences, while not "earth-shattering" in themselves, had a cumulative effect of "nudging" the finding to the dependent contractor end of the dependent-independent contractor continuum. Further, the applicant stressed three differences from the *Citizen* case which were asserted to be critical, i.e., greater company control over the drivers, a company "veto" regarding substitutes and proof of the "practical" impediment (as opposed to "legal" impediment) to obtaining work elsewhere. The *Citizen* case and the cases referred to therein, in particular *Algonquin Tavern*, [1981] OLRB Rep. Aug. 1057 and *Indusmin Limited*, [1979] OLRB Rep. Mar. 213 were reviewed in support of the applicant's contention that the drivers were dependent contractors.

8. The respondent argued that the *Citizen* case was determinative of the instant certification application. The respondent likewise reviewed the interim report and enumerated factors which were common to both operations. The respondent acknowledged that there were some differences in the circumstances but asserted these were not sufficient to justify a different conclusion from that reached in the *Citizen*, i.e., that the drivers were independent contractors.

9. The Board does not consider it necessary to set out the representations of the parties in further detail as the facts contained in the interim report were not in dispute and the relevance of the analysis enunciated in the *Citizen* case was agreed. Obviously, though, the parties have reached different conclusions when the circumstances here are compared with those in the *Citizen*. The Board thanks the parties for their able and thorough submissions. Further, it is not necessary to separately summarize the findings of fact. Rather, those findings are noted throughout the analysis, as appropriate.

10. The statutory definition of dependent contractor, section 1(1)(h) of the Act reads:

1.-(1) In this Act,

- (h) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic

dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

11. In view of the above, it is useful to here set out a rather extensive passage from the *Citizen*.

11. Whether or not individuals are dependent contractors within the statutory definition is a factual determination requiring consideration of the circumstances of each case (See *A. Cupido Haulage Ltd.* [1980] OLRB Rep. May 679 which referred to the Board engaging in a comparative exercise "to determine on which side of the mid-point of an imaginary line between independent contractor and employee the disputed persons fall," (at par.17)). In the Board's view, this factual determination in the instant case is not straightforward. Both counsel have noted factors which support their respective positions. The Board, however, considers that several comparisons are of particular assistance in analyzing the circumstances.

12. Firstly, it is useful to contrast the situation of the drivers in respect of whom this application is filed with another group of "drivers" clearly employees of the respondent. This latter group, called district supervisors, distributed the afternoon edition in the city. Trucks owned, insured and maintained by the respondent are used for the deliveries; the trucks bear the respondent's logo and colours. The district supervisors are assigned routes and any changes are monitored and subject to approval. The usual statutory deductions applicable to employees are taken from the bi-weekly salary. The district supervisors are required to phone in when sick, to obtain approval of vacation schedules, to justify any absences and to conform to the respondent's general rules and rules relating to driving vehicles of the respondent. The district supervisors are subject to the progressive discipline. The usual hiring process is followed, including a medical examination and creation of a personnel file, and training is provided. Of considerable note is that a district supervisor may not unilaterally arrange for a replacement and is prohibited from working for the respondent's competitors. In all the foregoing respects, the circumstances of the drivers in question stand in sharp contrast. To be sure, there was little evidence of "discipline". There was some indication of "warnings" and even perhaps of a "dismissal" but these acts would be equally consonant with a contractual relationship where one party breached the terms of the contract. Moreover, while the factors noted above, such as, the absence of statutory deductions from the payments to the drivers in question, are not individually determinative, taken together, the factors do set apart the "city and country" drivers from, not just the other employees of the respondent, but a sub-group of employees who perform not dissimilar functions.

13. A second useful comparison is between the drivers in question and other admittedly independent contractors also performing the identical function. This latter group comprises individuals who regularly utilize others to deliver the papers. Some independent contractors own their own cartage companies; some are responsible for one or more routes and hire employees to drive all or some of the routes. Conditions such as a reporting time, designated loading order for trucks, a manifest showing drop-off points, apply equally to both groups. This is not to say that such factors become "neutralized" in the sense of being non-existent. It may, however, suggest that the factors are reflective of the nature of the respondent's business, rather than evincing a "dependency" or absence of control analogous to an employee. The respondent publishes a daily newspaper, morning and afternoon editions, six days per week for the fifty-two weeks of the year. As noted earlier, the afternoon edition is delivered by district supervisors. The morning edition, in either the "country" or "city" version, is delivered by the drivers in question. However, the morning newspaper may be likened to "perishable" goods; it is of no value if delivered that afternoon, let alone the next day. Thus, the Board regards the establishment of a loading order for trucks (so that those with the farthest to go are loaded first), the setting of a reporting time and a manifest with what the respondent considers the optimum route (although this order is not binding on the driver) as flowing from the nature of the respondent's business. These factors, then, do not assist the applicant in satisfying the statutory definition.

14. The third comparison involves an examination of the Board's jurisprudence in the



area. The cases reveal a number of relevant factors or "clusters" of factors. The Board would note, though, that the factors must be utilized with caution as indicia of dependent contractor status in one industry may not be of great use in a different industry. One "cluster" of factors focuses on the identification of the company with the allegedly dependent contractor, e.g., use of logo and/or decals on delivery vehicles, wearing of company uniforms, etc: see *Tremways*, *supra*; *Miore Distributing*, [1981] OLRB Rep. Feb. 192; *Western Dispatch Inc.*, [1979] OLRB Rep. Apr. 362; *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083. No such indicia are present in the instant case. Another "cluster" deals with the ownership of the delivery vehicles, including financing arrangements, ownership of or restrictions on PCV licences, insurance restrictions and minimal levels of insurance, vehicle size and type restrictions. The more involved the company in dealing with the vehicles, the more likely dependent contractor status is made out: see *Nelson Crushed Stone*, *supra*; *Western Dispatch*, *supra*; *Tremways*, *supra*. Again, in the instant case, the drivers own, rent or borrow their trucks; the respondent is not involved in any way. The respondent does not set or monitor truck size or type, insurance levels, licences, etc.

15. The third "cluster" deals with the financial arrangements between the parties. Where the company unilaterally sets the rates, where the company deals directly with the customer in setting prices for the goods or services and in bearing the risk of non-collection, where the risk of loss/chance of profit from the operation accrues to the company, it is likely that the relationship will be found to be that of dependent contractor: see *Nelson Crushed Stone*, *supra*; *Adbo Contracting Company Ltd.* [1977] OLRB Rep. Apr. 197; *Superior Sand*, *supra*; *Flintkote*, *supra*; *Indusmin*, *supra*; *Miore Distributing*, *supra*. In *Nelson Crushed Stone*, *supra*, for example, not only did the company set the rate, but if a reduced price was negotiated with the customer, the company unilaterally passed along this reduced rate to the driver, without advance notice or opportunity to affect the quantum of the reduction. In essence, where the driver has been found to supply his or her labour and the "tools of the trade" (i.e., a vehicle), dependent contractor status has been made out: see *Superior Sand*, *supra*; *Adbo Contracting*, *supra*.

16. In the instant case, the financial arrangements do not unequivocally point in one direction. The company does set the rate according to a formula but there is some room for individual negotiation about increases, variations in the rate and extra payment for delivering papers where the initial load was short. Additionally, the city drivers negotiated payment for waiting time. Drivers are free to more efficiently organize their route and, thereby, reduce their costs. On the other hand, the drivers do not deal with customers directly or handle monies relating to customer accounts.

17. It is useful to refer to the *Algonquin Tavern* case, *supra*, wherein are listed factors which, alone or in combination, have been utilized to support a finding of dependent contractor status:

1. *The use of, or right to use substitutes.* It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour rather than one's own work and skill. This is significant however, only to the extent that it is the alleged employee who makes that decision.
2. *Ownership of instruments, tools, equipment, appliances or the supply of materials.* These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual's own labour. On the other hand, reliance upon another's financial or capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.
3. *Evidence of entrepreneurial activity.* This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop "clients", the use of agents, and organizing one's "business" (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a "chance of profit" or "risk of loss"; that is whether business

acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.

4. *The selling of one's services to the market generally.* If the purchasers of individual's services are numerous and of diverse character, the individual looks more like an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a "dependent" contractor or employee - especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his "prime customer" is given priority.
5. *Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.* Of course, few independent contractors are entirely free in this regard, but the question is one of the degree. A "self-employed" person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has "tied his fortunes".
6. *Evidence of some variation in the fees charged for the services rendered.* This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as "independent contractors", and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser's ability to pay, may indicate independent contractor or self employed status.
7. *Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.* Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and "place" of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer's organization. In the case of entertainers, the cases suggest that it may also be useful to determine the extent to which the artist's material or co-workers are influenced by the employer, that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered "integrated" into the employer's operation in the manner of an employee, if he is required to devote the whole of his working time during the period to the service of the employer, promote its organization, or fill in his "non performing" time with unrelated ancillary duties. (See: *Whittaker, supra.*)
8. *The degree of specialization, skill, expertise or creativity involved.* If these are a dominant element in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of "integration" into the respondent's organization, the disputed individual is "self-employed" professional.
9. *Control of the manner and means of performing the work - especially if there is active interference with the activity.* However, it is the right to interfere rather than the ability to do so which is significant. The fact that a particular occupation involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship at will and without cause may indicate an employment relationship whether or not the employer exercises this power.
10. *The magnitude of the contract amount, terms, and manner of payment.* If the financial terms of the relationship approximate wages (for example, if deductions are made for

income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be "employees"; and independent professionals may charge an hourly rate rather than a block fee).

11. *Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.* The employer's established employee complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. If the so-called independent contractor substitutes for a firm's employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee.

18. A number of these factors have already been discussed. The Board would here note, however, that the drivers are entitled to use substitutes (rather than just "helpers") without prior consultation with or approval of the company. The company does not monitor such use of substitutes beyond, of course, insisting that the papers be delivered at the appropriate time and place. This authority contrasts with the relationship in *Miore Distributing, supra*, where the company supplied the substitute and *Western Dispatch, supra*, where the company's consent to a replacement was required.

19. Items 5 and 7 of the listing set out in *Algonquin Tavern, supra*, are also of particular interest in the present circumstances. It is true that a number of the drivers have been associated with the company for several years; the witness, for seven years. However, as stated in *Algonquin*, the integration of the individuals into the company's organization is to be distinguished from mere coordination of the individual's activities. In this case, as the contrast between the drivers and the district supervisors underscores, the Board does not consider the drivers have been integrated into the company's operation. The economic mobility or independence of the drivers is also unusually high. The drivers are not "on-call" during the day to serve the company. There is a set route which takes relatively few hours of what would be expected to constitute a normal workday. City drivers average two hours to complete a route plus one to one and a half hours loading time. County drivers spend somewhat longer - an average of six hours. However, this time is "round trip", i.e., from the individual's home (which is in the country in the majority of cases) to the individual's home after picking up the papers in the city and making deliveries. It is not usual to calculate "working time" by computing the "door-to-door" period. Thus, the average of six hours must be regarded as an outside figure. Apart from the delivery route(s), the drivers have no restrictions whatsoever in earning other income, including working for competitors of the company. The "waiting time" services negotiated by the city drivers supports the inference that the payment is in the nature of an "opportunity cost".

20. It may well be that an individual is "dependent" on more than one person: see *Craftwood Construction Co. Ltd.*, [1980] OLRB Rep. Nov. 1613. [Dependence upon more than one person, however, must be distinguished from dependence upon an industry: *Algonquin Tavern, supra*.] The Board is of the view, though, that the economic dependence necessary under the definition in section 1(1)(h) of the Act must flow from the terms and conditions of the relationship between the parties. In the instant case, it is true that the witness stated (and it is to be assumed true) that his only source of income was the company. In that sense, he is in a position of economic dependence. That dependence, however, does not flow from the terms and conditions of the relationship. There is nothing explicitly restricting the drivers from seeking the income (no PCV restrictions, no prohibition against dealing with competitors, etc). Nor are there any implicit restrictions (identification with the company through logos or uniforms, an "on-call" situation for the working day or obligation to serve the respondent first, etc.). While the city drivers have negotiated waiting time payments and spend somewhat less time performing the deliveries than the country drivers (although the difference is not great given the different means of calculating the time spent), the Board is not persuaded that the differences are sufficient to lead to a different conclusion. Thus, on balance, after considering the points of comparison and relevant factors as set out above, the Board finds that the drivers are not dependent contractors within the meaning of section 1(1)(h) of the Act.



12. The Board considers it appropriate as well, to utilize the above passage from the *Citizen* as the organizational framework for discussion of the drivers' circumstances in the instant certification application. In this regard, the Board affirms that the Board is required to make a factual determination of the circumstances of this case to assess on which side of the "imaginary line" between dependent and independent contractors that drivers at LeDroit fall. In the Board's opinion, this factual determination is more difficult than in the *Citizen*. Moreover, the two useful comparisons in the *Citizen*, between the drivers for whom certification was sought and the clearly "employee" drivers there, and the admittedly independent contractors performing the same delivery functions for the *Citizen*, respectively, were not available here. The LeDroit "courses motorises", the motorized version of the ambulatory paper carrier delivering papers directly to subscribers, are so distinct with respect to their functions and circumstances that they cannot serve as a useful comparison group (nor were they put forward as an appropriate comparison by the parties).

13. As in the *Citizen* case, the Board regards some of the working conditions of the drivers as reflective of the nature of the respondent's operations rather than of assistance in resolving the drivers' status as dependent or independent contractors. The respondent publishes a daily newspaper, six days per week for fifty-two weeks per year. There is only one edition, although the Hebdo Semaines is also produced weekly. A newspaper may be likened to "perishable" goods. Deliveries which are excessively late can render the product worthless and, so, the company would be expected to address matters related to delivery. Thus, the establishment of a reporting time, a loading order and a manifest is to be expected in the circumstances, regardless of the drivers' status.

14. The first "cluster" of factors, as noted, to be considered relates to the identification of the company with the allegedly dependent contractors. In the instant case, the respondent does not require logos or decals on delivery vehicles. However, the respondent does make such material available on request and the use of LeDroit stickers is not uncommon. Some drivers apparently have promotional decals on the vehicles as well. Further, the respondent's name and colour are painted on one driver's truck - at his request, to be sure, but, significantly, at the respondent's cost. While no uniforms are required, drivers frequently purchase jackets and various other items of clothing bearing company identification. The Board has some additional comments, *infra*, with respect to the employee's association through which the jackets are purchased. It is important to here note, though, that the respondent does make a contribution to the purchase of those jackets.

15. The second "cluster" referred to in the *Citizen* dealt with the ownership of the delivery vehicles, financing arrangements, PCV licences, insurance levels and restrictions, specification of vehicle size and type. As in the *Citizen*, the respondent is not significantly involved with the drivers in this area. The drivers bear all capital costs and expenses related to their vehicles. The respondent has, on occasion, suggested upgrading or indicated that a particular size of vehicle is needed to perform the delivery duties. However, the Board does not regard this sporadic involvement, in itself, as indicative of a dependent contractor relationship.

16. The third "cluster", the financial arrangements between the drivers and the respondent, do reveal differences between the instant case and the *Citizen*. In both cases, there is a flat rate set for each route. In the *Citizen*, a formula was utilized but with some room

for individual negotiation as to increases, variations in the rate and extra payment for delivery where the initial load was short. In the instant case, the basis for the company's calculation is not as clear. In some instances, Belanger has accompanied the driver to assess the workload. Depending on that assessment, the respondent has sometimes unilaterally increased the flat rate. There is no evidence of individual negotiation in setting the rates. And, significantly, increases are determined by the respondent and, by and large, reflect rises in the price of gasoline. The process of arriving at the increases is also of note. It is Belanger who approaches his superiors, albeit perhaps in response to drivers' complaints, to seek the increases. The drivers (and Belanger himself) view Belanger as their supervisor who acts on their behalf in respect to rate increases. There is payment for waiting time to all drivers, not just the city drivers in the *Citizen* who negotiated that payment directly. Thus, the Board regards the financial arrangements as pointing toward the dependent contractor end of the continuum. The circumstances more closely resemble the cases where the individual supplied his or her labour and the "tools of the trade" (in this case, a delivery vehicle): see the *Citizen*, *supra*, and the cases cited therein at paragraph 15.

17. The Board does not intend to review each of the factors enumerated in the *Algonquin Tavern* case, referred to earlier. Some criteria, such as ownership of tools, variation in fees charged and other financial terms have already been dealt with. Another factor, the specialization, skill, expertise or creativity involved, is not relevant as this is unskilled work. Other indicia, though, merit further examination, either singly or in combination.

18. The use of, and right to use, substitutes reveals significant differences between the *Citizen* and the LeDroit drivers. In the former instance, the drivers were entirely free to select, control and pay substitutes without prior consultation with, approval of, or monitoring by the *Citizen*. LeDroit, by contrast, is far more involved with substitutes. That the drivers routinely inform Belanger that they are unable to perform the duties and a replacement will be utilized is not significant. What is revealing of the relationship of the drivers to LeDroit is that Belanger assists the drivers in finding replacements and/or has, on occasion, found a replacement himself. There is some evidence that LeDroit has a power of "veto" over substitutes "selected" by the drivers. For example, one individual who had specific delivery experience at LeDroit but who quit LeDroit in the past without sufficient notice was so vetoed. The respondent has even inserted itself in the rates to be paid substitutes, insisting that the drivers pay their substitutes the same rates as the drivers receive, at least where Belanger has been involved in proposing and/or finding the substitute. If the inability to perform the duties is unexpected, the result of a breakdown, for example, Belanger is notified and is actively involved in resolving the crisis by providing a LeDroit truck without charge to complete the route, occasionally personally assisting in the delivery, or finding a substitute. These factors individually point toward a dependent contractor relationship; the cumulative effect is even greater.

19. There is virtually no evidence of entrepreneurial activity, of the selling of services to the market generally. Usual indicia of such activity, e.g., advertising, soliciting of other business, are absent. The few drivers who have other sources of income do not earn this money in the "delivery business" but, rather, work in unrelated area and, often, with or for relatives.

20. The remaining three factors set out in *Algonquin Tavern*, *supra*, namely, economic mobility, integration into the operating organization of the company and the control over the



manner of performing work, strongly support a finding of dependent contractor status. The economic mobility of the drivers, in contrast to the *Citizen* drivers, is seriously restricted. There is no “legal” impediment to seeking other financial opportunities. The Board, though, regards the circumstances in which the drivers work as constituting a substantial “practical” impediment. For example, the number of hours worked, approximately five or six per day, approaches that of a normal work day and contrasts sharply with the average two hours for city drivers (and six hours of round trip time for country drivers) at the *Citizen*. The Board prefers the direct evidence of the drivers examined with respect to the time spent delivering the papers. Moreover, this time is regularly extended on the days that *Hebdo* is delivered and frequently increased by delays in producing the papers. Additionally, the delays themselves may be of considerable duration. LeDroit is the “prime” customer, the drivers simply must wait for the papers in order to perform their duties. This is much more like being “on-call” to serve the company than being an independent contractor.

21. The drivers may reasonably be described as integrated into, not merely coordinated with, the respondent’s operations. The length of service of the drivers is impressive even for a pure employment context. Moreover, the departures of at least two long-service drivers appear to have been regarded as “retirements”, viz., a “retirement” ceremony, newspaper article. The respondent asserted these activities merely represented company “civility” to long-service drivers. The Board, though, regards these factors as indicative of the parties’ perceptions of the relationship; such perceptions are not conclusive, by any means, but are useful in the Board’s overall assessment. Integration is also evinced by the fact that the drivers do more than just deliver papers. Depending on the delivery point, the drivers may manually count the required number of papers, may pick up and record the “returns” (i.e., unsold papers), place the papers in plastic bags, deliver promotional material at various times during the year. Indeed, for some time, certain drivers were *required* to deliver copies of another newspaper (the *Globe & Mail*) under separate terms for remuneration.

22. There is also the matter of the employees’ association. It is true that the membership is voluntary and the association is a social organization which in a formal sense is somewhat distanced from the respondent. However, that the drivers are permitted to join the association again goes to the perception by the parties of the relationship. The drivers generally are members of the association and were invited to join by Belanger himself, who is active in the organization. Finally, the respondent actually deducts the association dues from the rates paid the drivers. In fact, the respondent also usually deducts the subscription rates for those drivers who take the paper from the monies paid as well. (The Board notes the evidence is not especially clear on the rates charged for the subscriptions but this point is not relevant.)

23. There is also more “monitoring” of the drivers at LeDroit. For example, new drivers do receive some training by Belanger. The order of stops is not entirely within the authority of the drivers to alter; Belanger has insisted on a specific sequence of drops in some instances. Control more akin to an employment setting is also revealed in the process by which drivers obtain routes: there are applications; seniority is a consideration when better routes become available. Control by the respondent is also evident in the arrangements made for one driver, Whissel. That driver has the shortest route and another job where he is obligated to report at a definite time. The loading of the drivers is scheduled to accommodate Whissel, rather than simply to facilitate delivery of the papers to the more distant points. It was the respondent’s choice to make these special accommodations, and, of course, if LeDroit decided otherwise at any point, Whissel would apparently be unable to satisfy both commitments.



Whether the company could accommodate the other drivers in similar fashion is doubtful, but this aspect is not critical. What is important is that it is the respondent who determines whether special arrangements, not dictated by the nature of the enterprise, will be made. This sort of control more clearly resembles an employer-employee relationship than that of independent contractor.

24. To summarize, while some factors merely “nudge” the assessment toward the dependent contractor side of the imaginary line and some may be described as neutral, none strongly point to a status of independent contractor. In contrast to the *Citizen* case, a number of factors in the instant case, in the Board’s view, do favour a finding of a dependency relationship including the financial arrangements, the selection and use of substitutes, entrepreneurial activity/marketing and economic mobility/integration/control.

25. The Board regards the *Citizen* and LeDroit as “companion” cases, in a sense. The assessment of dependent or independent contractor status is a factual determination in the context of the circumstances of each case, an assessment which is often not a straightforward matter. These two cases, despite a number of similarities, some superficial and some more substantial, neatly illustrate the “imaginary line” between dependent and independent contractors. In the *Citizen*, the Board concluded that, on balance, the drivers fell on the independent contractor side of the fictional line. In the instant case, the Board, again on balance and for the reasons set out above, finds that the LeDroit drivers fall on the other side of that line. That is, the drivers are properly characterized as dependent contractors within the meaning of section 1(1)(h) of the Act.

26. The Board has reached this conclusion in the context of examinations of ten of the twenty-six drivers for whom the applicant seeks certification and the two additional witnesses called by the respondent. The respondent concedes that the general trend of any examination of the remaining drivers would be the same but does seek further examinations. In the circumstances, the Board directs that the parties make written representations to the Board by September 20, 1985, as to whether additional examinations should be conducted. Should the respondent not seek such further examinations given this decision of the Board, this matter shall be relisted for hearing to resolve the issues remaining in the certification application.

26. Accordingly, this matter is referred to the Registrar.

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**1751-83-R** Christian Labour Association of Canada, Applicant, v. **Marsdale Manor Nursing Home**, owned and operated by Versa-Care Limited, Respondent, v. Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, Chartered by the United Food & Commercial Workers International Union, Intervener

Certification - Collective Agreement - Representation Vote - Parties erroneously believing collective agreement extended by *Inflation Restraint Act* - Signing document altering non-compensatory terms - Whether document constituting collective agreement by itself or having effect of extending collective agreement - Whether new vote directed because of delay since conduct of pre-hearing vote

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *S. O'Flynn* and *I. M. Stamp*.

**APPEARANCES:** *W. R. Herridge, Q.C., T. Whelan* and *H. Beekhuis* for the applicant; *R. Gordon Spear* for the respondent; *James R. Thomas* for the intervener.

**DECISION OF THE BOARD;** September 19, 1985

1. This is an application for certification in which the Christian Labour Association of Canada ("CLAC") is seeking to displace Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, Chartered by the United Food & Commercial Workers International Union (the "UFCW") as bargaining agent for employees of the respondent.

2. The application, which was filed on November 1, 1983, requested that the Board conduct a pre-hearing representation vote. Such a vote was conducted on February 22, 1984. At the conclusion of the vote, the ballot box was sealed and none of the ballots counted. The Board postponed consideration of the merits of the application pending the outcome of certain Court proceedings relating to the timeliness of displacement applications for certification involving employees in nursing homes.

3. The provisions of the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act* indicate that a displacement certification application with respect to employees of a nursing home can be filed during the last two months of a subsisting collective agreement. At the time of the filing of the instant application, however, there existed an uncertainty as to when it was that collective agreements covering employees in nursing homes actually expired. This uncertainty flowed from section 13 of the *Inflation Restraint Act, 1982* which provided as follows:

Notwithstanding any other Act except the *Human Rights Code, 1981* and section 33 of the *Employment Standards Act*, but subject to section 14, the terms and conditions of,

• • •

(b) every collective agreement that includes such a compensation plan,

shall subject to this Part continue in force without change for the period for which the compensation plan is extended or made subject to this Act.

4. In the *Broadway Manor Nursing Home* case, [1983] OLRB Rep. Jan. 26, the Board concluded that the effect of section 13 of the *Inflation Restraint Act* had been to extend the operation of a collective agreement and thereby postpone for a year the "open period" during which a displacement certification application could be filed. The Board's decision in the *Broadway Manor* case was taken on judicial review to the Divisional Court. On October 24, 1983, a majority of that Court concluded that the Board had properly interpreted the effect of section 13 of the *Inflation Restraint Act*, but because of the freedom of association guaranteed by the *Canadian Charter of Rights and Freedoms*, the *Inflation Restraint Act* could not have had the effect of postponing the open period. The matter was then appealed to the Ontario Court of Appeal. On October 22, 1984, that Court determined that both the Board and the Divisional Court had misinterpreted the *Inflation Restraint Act*, and that the Act did not, in fact, have the effect of actually extending a collective agreement.

5. We turn now to consider the facts of the instant case. The respondent and the UFCW were parties to a collective agreement which operated from August 1, 1980 until December 31, 1982. On November 3, 1982 the Minister of Labour appointed a conciliation officer to assist the parties to negotiate a new collective agreement. The *Inflation Restraint Act* received Royal Assent on December 15, 1982. On January 10, 1983 the Minister of Labour, acting on the assumption that the effect of the Act had been to extend the term of the expired collective agreement, purported to revoke the appointment of the conciliation officer. On May 16, 1983, after the Board decision in the *Broadway Manor* case, the respondent and UFCW entered into a three-page document. The first page, in addition to the signatures of representatives of the parties, stated as follows:

BETWEEN: MARSDALE MANOR NURSING HOME

OWNED & OPERATED BY  
VERSA-CARE LIMITED

Hereinafter referred to as "The Employer"

AND

HEALTH, OFFICE & PROFESSIONAL EMPLOYEES, a division of Local 206, chartered by the United Food and Commercial Workers International Union,

Hereinafter referred to as "The Union"

The Parties herein agree that the said Collective Agreement shall include the terms of the previous Collective Agreement which expired on *December 31, 1982* and as extended by Bill 179 to December 31, 1983, provided however, that the following amendments are incorporated as mutually agreed to by the above-mentioned parties.

The second and third pages of the document contained a number of provisions amending certain of the non-compensatory articles in the 1980-82 agreement.

6. It is apparent from the wording of the May 16, 1983 document that when it was



entered into, both the respondent and CLAC were under the impression that section 13 of the *Inflation Restraint Act* had extended the term of the 1980-82 collective agreement, and that they were amending certain of the non-monetary terms of the agreement. If the 1980-82 agreement had, in fact, been extended by the *Inflation Restraint Act* to December 31, 1983, then the instant application would be a timely application, having been filed within the last two months of the agreement's operation. The judgment of the Court of Appeal in the *Broadway Manor* case, however, establishes that the *Inflation Restraint Act* did not extend the term of the 1980-82 collective agreement. What then is the status of the May 16, 1983 document? As a starting point, we would note that at the hearing into this matter, no party contended that the effect of the document was to extend the 1980-82 collective agreement independently of the provisions of the *Inflation Restraint Act*. Indeed, having regard to section 52 of the *Labour Relations Act*, which provides that parties can agree to continue the operation of an expired collective agreement only for a period of less than one year while the parties to the agreement are bargaining for its renewal, it is doubtful that the May 16, 1983 document could have legally extended the term of the previous collective agreement in that the extension would have been for a full year and at a time when no negotiations were taking place.

7. CLAC takes the position that the document of May 16, 1983, was itself a collective agreement which incorporated by reference the provisions of the 1980-82 agreement, subject to the noted changes. This new agreement, contends CLAC, expired on December 31, 1983. If CLAC's position is accepted, this application would be a timely displacement application in that it was filed during the last two months of the agreement's operation. The UFCW, however, takes a different view of the matter. According to the UFCW, the May 16, 1983 document cannot be viewed as a collective agreement, but only an agreement to alter existing non-compensatory terms of employment under section 15 of the *Inflation Restraint Act*. This being the case, contends the UFCW, there was no collective agreement in operation in 1983 and, accordingly, the 1980-82 agreement must be viewed as the last applicable collective agreement. Because a conciliation officer was appointed on November 3, 1982, when the 1980-82 agreement was about to expire, and because section 61 of the *Labour Relations Act* provides that no displacement application can be filed until a year has passed since the appointment of a conciliation officer, it is the UFCW's contention that the earliest a displacement application could have been filed was on November 3, 1983. The UFCW further contends that since the instant complaint was filed on November 1, 1983, two days previously, it was untimely. As an alternative position, the UFCW submits that the wording of section 12(2) of the *Hospital Labour Disputes Arbitration Act* is more restrictive than section 61 of the *Labour Relations Act* and does not allow any displacement certification application after a conciliation officer has been appointed.

8. As indicated above, from the wording of the May 16, 1983 document, it is clear that when the UFCW and the respondent entered into it, it was their understanding that the *Inflation Restraint Act* had the effect of extending the 1980-82 collective agreement, and that it was their intent to amend certain of the non-compensatory articles in the agreement. We now know that their understanding of the effect of the Act was in error. However, there can be no doubt but that both the UFCW and the respondent understood that they would be covered by a collective agreement which would run until December 31, 1983. Indeed, in referring to the document of May 16, 1983 they agreed that "...the *said collective agreement* shall include the terms of the previous collective agreement..." (emphasis added). The May 16, 1983 document, if viewed as incorporating the terms of the previous agreement as amended, meets the definition of a collective agreement set out in section 1(1)(e) of the *Labour Relations*

*Act*. In all of the circumstances, it is our opinion that the most reasonable interpretation to be given to the May 16, 1983 document is that it was a separate collective agreement covering the period January 1, 1983 to December 31, 1983. In that the instant application was filed during the last two months of the agreement's operation, it is a timely application.

9. The final issue to be dealt with relates to the submission by the respondent and the UFCW that, given the time that has passed since the holding of the pre-hearing representation vote in this matter, it would be appropriate for the Board to direct the taking of a new vote. We do not agree. The very purpose of a pre-hearing representation vote is to allow for the canvassing of employee wishes about union representation prior to the delays associated with the litigation of legal issues relating to the application. Given the fact that this matter did not proceed to hearing until after the conclusion of the Court proceedings relating to the *Broadway Manor* case, the delay has been of exceptional length. Nevertheless, even assuming we have the jurisdiction to do so, we are not prepared to depart from the procedures set down in section 9 of the *Labour Relations Act* for dealing with pre-hearing representation vote applications. We would also refer to the following reasoning of the Board in *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387 at page 1405, where the Board, when dealing with a somewhat different fact situation, indicated that the mere passage of time should not affect the outcome of a certification application:

37. However, before considering the petition and counter-petition, we need to deal with the respondent company's position urging that the passage of time since the filing of this application justifies the directing of a representation vote. We cannot agree that a representation vote should be directed on the sole basis of the passage of time since the date of filing of this application for certification. Prior to the interim certification provisions enacted in 1975, the Board experienced many complex applications, that without the intervention of judicial review, took a very long period of time to process differences between the parties. These differences usually centered on the configuration and composition of the bargaining unit. Even today, complex applications for certification involving widespread unfair labour practices or bargaining unit problems can take more than a year to process. If the Board were to accept that the mere passage of time could so fundamentally affect the outcome of an application for certification, an unfairness would be visited on those applicants who, by no fault of their own, become involved in complex and lengthy certification matters. There may also be encouragement for some parties to seek to delay a case in order to achieve this outcome. Clearly, there are equities on both sides of this issue. The turnover in the employer's work force since the date of application is considerable. However, as already noted, the same level of turnover is possible in a lengthy application for certification not involving judicial review. In fact, the statute, by creating the concepts of "application date" and "terminal date", has considered the effects of labour force turnover and recognized that at some point in time the composition of a bargaining unit must be considered frozen to provide a stable basis for the purposes of a certification application. See *Fuller's Restaurant*, [1980] OLRB Rep. Sept. 1289. Considering the submissions of the parties and the evidence before us, we are of the view that the parties are best put in the position they would have been in had the Board not erred by considering this application as if there had been no passage of time.

10. Having regard to the foregoing, we direct that the ballots cast in the pre-hearing representation vote now be counted.

11. The matter is referred to the Registrar.

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**1607-84-U Donald McConvey, Complainant, v. United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 46, Respondent**

**Evidence - Practice and Procedure - Letter written by employer directly speaking to alleged unlawful conduct of union - No claim that author of letter not available to testify - Whether letter admissible in evidence - Whether complainant permitted to question union witness as to contents of letter**

**BEFORE:** *Owen V. Gray*, Vice-Chairman.

**DECISION OF THE BOARD;** September 10, 1985

1. During the ongoing hearing of this complaint, I have ruled on more than one occasion that I will not admit into evidence a letter written to the complainant by a third party and tendered by the complainant as evidence of the truth of its contents. Counsel for the complainant has filed a written request that I reconsider those rulings and admit the letter into evidence when the hearing of this complaint continues September 10, 1985. Having now considered the submissions made by counsel for the complainant in his letter of August 19, 1985, and the submissions of counsel for the respondent trade union in his letter of August 30, 1985, I am satisfied that the request should be denied.

2. The complainant is a member of the respondent trade union. When work is available, he works as a pipefitter for pipeline contractors who are party to collective agreements with the respondent's parent International Union and those of its Locals, including the respondent local, to which it has assigned pipeline jurisdiction. The provisions of those collective agreements which control the hiring of journeymen pipefitters and welders for pipeline construction projects give the employer the right to fill a certain percentage of the available jobs with trade union members it requests by name with the trade union selecting and referring the remainder of the required employees. Because pipeline contractors have the right to "name hire" a percentage of their crew, experienced pipeline workers solicit work by approaching contractors directly and asking that they be "name hired".

3. The complainant says the respondent trade union violated section 69 of the *Labour Relations Act* by refusing to honour contractors' requests to "name hire" him and by interpreting and administering the applicable collective agreements in such a way as to restrict the opportunity for "name hires" and, therefore, the opportunities for direct solicitation of work.

4. The complainant alleges that Marine Pipeline of Canada Limited ("Marine") is one of the contractors whose request to "name hire" him was refused by the respondent trade union, and says the particulars of this allegation are set as out in a letter written to him on August 22, 1984 by Jerry Lozynsky, a Project Administrator employed by Marine. The body of the letter reads as follows:

This letter will confirm our endeavours to name request you for employment on our pipeline project for I.P.L. in Clarkson, Ontario. The following is a brief summary of the events:



1. On July 5, 1984, we called the Local 46 dispatch office and name requested you as a journeyman for our pipeline project. We were advised at that time by the pipeline business agent that you were too far down the list and therefore you were unable to be dispatched to the project.

2. On July 6, 1984, we again called the Local 46 dispatch office and requested you as a Straw Boss. We were advised that this could be facilitated, but you were not able to perform any journeyman work.

We found this situation impractical and inefficient for our project, and therefore we ceased our endeavours to obtain your services on our project.

Should you require additional information, please contact us at 403-274-3443 in Calgary.

This is the letter counsel for the complainant wishes admitted into evidence as proof of the allegations contained in it.

5. Counsel for the complainant had originally intended to call Lozynsky as a witness. His availability was one of the factors cited by counsel when dates for the continuation of this hearing were arranged. When Lozynsky was not called on the arranged continuation dates, counsel for the complainant explained to the Board that he had had the impression that Mr. Lozynsky would come without a subpoena, but only the day before the hearing had been told by Lozynsky that he would "fight it." Counsel did not request an adjournment for the purpose of serving a subpoena or otherwise seeking to compel the attendance of Mr. Lozynsky as a witness. Although Lozynsky is said to reside in Calgary, counsel did not then and does not now argue that Lozynsky would have refused on jurisdictional grounds to comply with a formal demand by this Board that he testify in these proceedings if such a demand were served on him together with the appropriate conduct money. Without exploring any of these issues, counsel chose to close the complainant's case-in-chief without having introduced any direct evidence of the matters referred to in Mr. Lozynsky's letter. Counsel has never suggested that he did so because an attempt to bring Lozynsky before the Board would have been futile. Indeed, he has said he may attempt to call Lozynsky as a reply witness once he has heard the evidence of the respondent's witnesses. His decision not to call Mr. Lozynsky in his case-in-chief is not inconsistent with a prudent reluctance to call a witness who may be unwilling, when under oath and subject to cross-examination, to repeat what has been said in a private communication. Even counsel's request for reconsideration makes no suggestion that Lozynsky could not be made available to testify before this Board. The only reference to the complainant's difficulty with Mr. Lozynsky is in the final paragraph of the request for reconsideration:

The Ontario Labour Relations Board as a specialized administrative tribunal, empowered to decide on the standard of representation an employee can expect from his union who holds the exclusive right to set and administer the terms of his employment, will be aware of the difficulty such employees encounter when they must rely upon the assistance of an employer to prove their case; especially an employer who is concerned about maintaining a continuous, harmonious relations with the union. It is respectfully submitted that the Board's broad powers in regards to the evidence it has the discretion to accept, coupled with its expertise were designed to be exercised in just such a case as this one of Mr. McConveys.

The implication of this submission is not hard to discern. However reluctant we may expect employers to be about taking sides in a dispute between an employee and his trade union

bargaining agent, the Board is not prepared to assume that this reluctance will lead employers and their representatives to commit perjury rather than endanger harmonious relations with that trade union.

6. During his examination-in-chief, the complainant testified to a telephone conversation with Mr. Lozynsky in which Lozynsky said the same things as are set out in his letter of August 22nd. The letter itself is nothing more than the complainant's testimony was: a report of what Mr. Lozynsky said to McConvey about certain matters in issue in these proceedings. The testimony and the letter may well be reliable evidence that Lozynsky said these things to Mr. McConvey, but the mere fact that he said them has no relevance in these proceedings. The content of the statements attributed to Lozynsky by his letter and by McConvey's testimony would be relevant if true, but the letter and the testimony are only hearsay evidence of the truth of the statements attributed to Lozynsky.

7. Hearsay evidence may take many forms and arise in a wide range of circumstances. In some forms and circumstances, such evidence is inadmissible in a court of law bound by the strict rules of evidence. In other forms and circumstances, evidence of a hearsay nature may be admissible even in a court bound by the strict rules of evidence. In the latter case, the hearsay nature of the evidence is a matter which goes to the weight the trier of fact should give to it in determining the issues at hand. By virtue of subsection 103(2)(c) of the Act, this Board has the power "to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not." Whether or not the decision of the Ontario Divisional Court in *Re Girvin et al and Consumers Gas Co.*, (1974) 1 O.R. (2d) 421 stands for the proposition that a statutory power of this sort does not permit an administrative tribunal to make a decision based exclusively on hearsay evidence, it does support the perhaps obvious proposition that the discretion imported by a statutory power of this kind does not relieve a tribunal of the obligation to conduct a fair hearing.

8. When Mr. Lozynsky spoke and later wrote to Mr. McConvey, he was not giving testimony in circumstances in which a knowing failure to tell the truth, the whole truth and nothing but the truth would attract criminal sanctions, if not also spiritual ones. The accuracy and completeness of his statements were not then subject to cross-examination by the respondent, and the letter cannot be cross-examined in this hearing before the Board. I accept as a general proposition that the rules of natural justice and fairness will not always require a quasi-judicial tribunal to exclude from consideration hearsay reports of statements made without the accompaniment of an express solemn undertaking to tell the truth by persons who are not made available to be cross-examined before the tribunal with respect to those statements. Judgements whether any weight should be given to such reports turn on a number of factors, including the nature of the issue to which the proposed evidence is directed and the circumstances in which the hearsay statements were originally made. The issue addressed by the hearsay evidence in question here is not collateral or uncontroversial. The letter speaks directly to acts and omissions complained of as violations by the respondent of the *Labour Relations Act*. It was written to answer McConvey's questions of Marine about its failure to provide an expected job. Nothing in the nature of the issue itself warrants shifting the burden of adducing evidence on this aspect of the complaint to the respondent on the strength only of the complainant's belief that wrongdoing has occurred. Nothing in the circumstances which brought the letter into existence minimizes the dangers normally associated with reception of hearsay evidence. In my view, fairness to an accused respondent requires that testimony addressed directly to such a central and controversial issue be received directly, under oath

(or solemn affirmation) and subject to cross-examination, or not at all. I was and am satisfied that the conduct of a fair hearing of this complaint requires that I give no weight to the Lozynsky letter as evidence of the truth of its contents. Having come to that conclusion, I was and am of the opinion that it would not be proper to mark it as an exhibit or otherwise formally receive it into evidence. Accordingly, I confirm my ruling that I will not receive the letter into evidence.

9. After this complaint was filed and before Board's hearing of it began, counsel for the complainant provided a copy of the Lozynsky letter to the respondent trade union. During his cross-examination of Mr. O'Ryan, the respondent's business manager, counsel for the complainant asked questions about the letter and about a conversation O'Ryan had had about it with a representative of Marine. In his request for reconsideration, counsel for the complainant asks that I reconsider what he describes as my:

further ruling denying the Complainant the opportunity to ask questions of the Respondent's witnesses as to their knowledge of this letter, its contents and the enquiries the Respondent made, if any, as to the truthfulness of the allegations contained in the letter.

The ruling referred to was on an objection by counsel for the respondent to questions designed to have Mr. O'Ryan recite the allegations in the Lozynsky letter and repeat what Marine's Mr. Nash, Lozynsky's superior, said to O'Ryan about the truth or otherwise of the allegations made in Lozynsky's letter. While counsel for the complainant argued that the quality and results of O'Ryan's investigation of McConvey's complaint were somehow relevant to these proceedings, there is no allegation that the respondent was obliged by section 69 of the Act to conduct such an investigation in a particular way, or at all. The hearsay statements contained in Lozynsky's letter are no more admissible for the truth of their contents when they come from the mouth of Mr. O'Ryan than they are when they come by means of a piece of paper or through the mouth of Mr. McConvey. If Lozynsky later said something to Mr. Nash which Mr. Nash repeated to Mr. O'Ryan, Nash's report of that conversation would not be admissible for the truth of its contents, and would have no relevance for any other purpose. I ruled that questions designed to elicit information about what Lozynsky said to others would not be admitted as evidence of the truth of the statements attributed to Lozynsky, and I confirm that ruling.

10. It is important to note that counsel's characterization of this ruling was potentially imprecise. In ruling that the respondent's witnesses could not be asked about the content of the Lozynsky letter, it was made quite clear it was the content *per se*, and not the subject matter of the content of the letter, which was the subject of the ruling. Counsel for the complainant *has* asked the respondent's witnesses about any conversations which may have occurred between them or anyone in the respondent's office and anyone in Marine's office during the relevant time with respect to the employment by Marine of Mr. McConvey. At this point in the hearing, the respondent has called its business manager and both of its dispatchers. The issue of the union's dealings with Marine at the relevant time has been the subject of questions and cross-examination of each of these witnesses. If the respondent calls its pipeline business agent, as it has said it proposes to do, then counsel for the complainant will have an opportunity to cross-examine him on these issues as well. In that context I am unable to understand what counsel for the complainant had in mind in his submission that:

To deprive the Complainant of being able to cross examine on this letter restricts him from fully presenting his case.



11. In summary, I am not persuaded either that these rulings should be reconsidered or that they should be varied, and the request contained in counsel's letter of August 19, 1985, is, therefore, denied.

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**1223-84-R; 1457-84-R** Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Miracle Feeds**, a division of Ogilvie Mills Ltd., Idealease (London) Ltd., and 571591 Ontario Inc., Respondents

Related Employer - Employer leasing trucks from one company and obtaining services of drivers from another - Driver supply company certified with respect to its driver employees - Whether three entities related employers - No pre-existing collective bargaining relationship - Mere speculation as to what may happen in future not sufficient basis for declaration - Board assuming conditions met - Not exercising discretion in circumstances

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *L. C. Collins* and *R. McMurdo*.

**APPEARANCES:** *Eric del Junco* for the applicant; *Derek L. Rogers* and *George Thompson* for Miracle Feeds, a division of Ogilvie Mills Ltd., *R. M. Parry* and *Paul Martin* for Idealease (London) Ltd. and 571591 Ontario Inc.

**DECISION OF HARRY FREEDMAN, VICE-CHAIRMAN, AND BOARD MEMBER R. McMURDO;** September 27, 1985

1. The applicant originally sought certification in respect of a bargaining unit of drivers nominally employed by the respondent 571591 Ontario Inc., hereinafter referred to as Custom, who operated vehicles owned by the respondent Idealease (London) Ltd., hereinafter referred to as Ideal. Those vehicles were leased to the respondent Miracle Feeds, and all of the work done by the drivers related to the transportation of Miracle Feeds' products. The applicant had submitted that Miracle Feeds was the actual employer of the employees in question, and in the alternative, that the respondents were carrying on related activities or businesses under common control or direction and that the Board should declare, under section 1(4) of the *Labour Relations Act*, that all of the respondents are one employer under the Act.

2. By a decision dated May 3, 1985, the Board certified the applicant for the employees of Custom since it had orally ruled at the conclusion of the applicant's argument at its hearing on April 30, 1985, that Custom was the employer of the employees in question. The Board then received the submissions of the parties with respect to the applicant's request for a declaration under section 1(4) of the Act and at the conclusion of argument, reserved its decision.

3. Miracle Feeds' business is the development, distribution and sale of livestock feed.

Miracle Feeds is an operating division of Ogilvie Mills Limited which is a wholly owned subsidiary of John Labatt Limited. The livestock feed which it sells and distributes is the nutritious by-products of the food and beverage industry that it removes from distilleries, breweries, and food processing plants. Its business is time sensitive in that the removal of its suppliers' by-products must be carried out at certain points in time or else its suppliers' plants will be shut down. Its customers' demands for livestock feed, which can fluctuate a great deal, must also be satisfied on short notice. The by-product is taken from suppliers' storage tanks and is loaded into appropriate trucks depending on whether the by-product is wet or dry grain and is then delivered directly to Miracle Feeds' customers.

4. Prior to April 30, 1984, the transportation of Miracle Feeds' products was performed by Hedley Bennett Trucking Ltd. Hedley Bennett Trucking Ltd. employed the drivers who performed the work and owned most of the equipment used to transport Miracle Feeds' products. Those employees did not engage in collective bargaining with Hedley Bennett Trucking Ltd. It began working for Miracle Feeds in late 1971 until its arrangement with Miracle Feeds was terminated in April 1984.

5. The respondent Ideal was created on April 11, 1984, (originally as 571514 Ontario Inc.) to carry on the business of full maintenance leasing of heavy equipment. It became known as Ideal in July 1984. Its principals are also the principals of an International Harvester truck dealership in London, Ontario, Forest City International Trucks Limited. Ideal is a member of Idealease Inc. which is a corporation and an association whose members are International Harvester truck dealers and is an organization that enables its members to provide full maintenance leasing services to customers across Canada.

6. Custom was incorporated on April 26, 1984, approximately two weeks after 571514 Ontario Inc., was incorporated.

7. Paul Martin is the president of Ideal and is the Vice-President of Forest City International Trucks Limited. While he does not own shares of Custom, Custom was incorporated at his request and Mr. Martin has the effective day to day control of its affairs. It is clear that Custom and Ideal are under common control and direction.

8. The relationship between Ideal, Custom and Miracle Feeds arose because Mr. Martin mentioned to George Thompson, the transportation manager of John Labatt Limited, that he was interested in getting into the leasing business. This conversation took place in late 1983. Mr. Thompson, who had been assigned some responsibilities for the transportation function of Miracle Feeds, asked Mr. Martin to give him a quote for the lease of vehicles that would be necessary to meet the Miracle Feeds transportation requirements. Mr. Martin, in his quote of January 1984, indicated that his company, Forest City International Trucks Limited, could not provide drivers for the leased equipment but did suggest a combined rate per mile that would cover both drivers and equipment that was based on his inquiries of driver supply companies. Shortly after the quote was submitted, Miracle Feeds decided that it would use the equipment leased from Mr. Martin's company.

9. Miracle Feeds had determined in late 1983 that it would no longer continue the arrangement with Hedley Bennett Trucking Ltd., but rather would operate with leased equipment and use drivers employed by a driver supply company. Mr. Thompson advised the Board that such arrangements are not unique and have been used by many businesses that do

not want to be a “common carrier” but that do provide trucking services. After the arrangements for the leasing of equipment were made, Mr. Thompson and Mr. Martin discussed obtaining drivers to operate that equipment. It was then that Mr. Martin decided to create Custom and reached an agreement with Mr. Thompson to supply drivers for that leased equipment. There is no written agreement between Miracle Feeds and Custom and their agreement can be terminated by either party at any time.

10. Neither Miracle Feeds, nor any of the corporations with which it is associated, nor any of their employees or officers, has any financial or proprietary interest in either Ideal or Custom.

11. It was both Mr. Martin’s and Mr. Thompson’s desire to maintain continuity of service in the changeover from Hedley Bennett Trucking Ltd. to the new arrangement with Ideal and Custom. In that regard, Mr. Martin, through Forest City International Trucks Limited, hired Patricia Knott, who had worked for Hedley Bennett Trucking Ltd. in its office and knew both the drivers and the Miracle Feeds’ operations. Mr. Martin, through Custom, also hired a majority of the drivers who had been working for Hedley Bennett Trucking Ltd. The selection of which drivers were hired was based on recommendations made to Mr. Martin by Ms. Knott. Mr. Thompson was not directly involved in the hiring of the drivers, although Mr. Martin did provide Mr. Thompson with a list of the drivers for insurance purposes since Miracle Feeds was insuring the vehicles it was leasing from Ideal.

12. Miracle Feeds is Custom’s only client. While Ideal has attempted to attract other leasing clients, it only had one other client that had leased a single vehicle. It is clear that Miracle Feeds is the principal source of revenue for Ideal and the only one for Custom and is the entity that is the source of the work performed by the employees of Custom. Ideal has attempted to secure other leasing clients and has submitted quotes to potential customers who are not related in any way to Miracle Feeds. Custom has not yet made efforts to expand its client base. Miracle Feeds has not imposed any restrictions on Ideal or Custom performing work for others.

13. The applicant seeks to invoke section 1(4) and requests the Board to declare that Miracle Feeds, Custom and Ideal are one employer for purposes of the *Labour Relations Act*. It is clear to us that much of the day to day work that is performed by the employees of Custom is determined, to a large degree, by Miracle Feeds’ needs which are communicated to Ms. Knott, and on occasion to the drivers directly. While Custom establishes the actual wage rate that the drivers are paid, it is beyond doubt that those rates are affected by the payment terms negotiated between Custom, Ideal and Miracle Feeds. The vehicles operated by Custom’s employees all carry the Miracle Feeds’ colours and logo, but also plainly state from whom they are leased. As the Board stated in its earlier decision in this matter, the employees were made aware that Custom, and not Miracle Feeds, was their employer.

14. When the Custom and Ideal arrangement replaced the Hedley Bennett Trucking Ltd. arrangement for Miracle Feeds’ transportation requirements, there was a continuity of service and a continuity of work methods followed by the employees. It was apparent from the evidence that there was no real change in the working relationships of the employees with Miracle Feeds and with Ms. Knott after the employees of Hedley Bennett Trucking Ltd. became employed by Custom. The employees carried on, in large part, as they had done when they had worked for Hedley Bennett Trucking Ltd.



15. In asking the Board to invoke section 1(4) of the Act, counsel for the applicant submitted that the activities of Miracle Feeds, Custom and Ideal are related and that they are carried on under common control and direction. He further submitted that the Board ought to exercise its discretion to make the declaration in order to ensure that there is some stability to the collective bargaining relationship. He argued that that stability would not exist because of the potential for Miracle Feeds, which is the only source of the work the employees of Custom perform, to terminate its relationship with Custom and have its work performed by others.

16. Counsel for the respondents both submit that Custom, Ideal and Miracle Feeds are not under common control or direction. They submit that Miracle Feeds is not involved in the management of Custom or Ideal and that there is no control exercised by Miracle Feeds through ownership or financial interest in Custom or Ideal. They further submit that the circumstances that exist in this case do not give rise to the mischief which section 1(4) was intended to cure.

17. Section 1(4) of the Act empowers the Board to declare that two or more distinct entities are one employer for purposes of the Act when those entities carry on associated or related activities under common control or direction. The Board is not required to make such a declaration even if the conditions set out in section 1(4) are met. The Board will exercise its discretion to do so only when compelling labour relations reasons exist in the circumstances under consideration.

18. The applicant in this case submits that the bargaining rights held in respect of Custom may be subverted if Miracle Feeds decides to change its method of operation. Therefore, it submits that the Board should make the declaration requested so that Miracle Feeds' economic activity, which is the source of employment for Custom's employees, can be the subject of collective bargaining with it. The applicant relies principally on the Board's decision in *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214.

19. Even assuming, without finding, that the respondents carry on related activities or businesses under common control or direction, we are not persuaded that we should exercise our discretion to make the order requested. There is no pre-existing collective bargaining relationship between the applicant and Miracle Feeds which is being affected by the arrangement that Miracle Feeds has with the other respondents, unlike the situation in *Penmarkay Foods Limited*, *supra*, *J. H. Normick*, [1979] OLRB Rep. Dec. 1176 or *Don Mills Bindery*, [1983] OLRB Rep. Dec. 2008. Indeed, except for the change of the employees' employer's name, the employees have continued to work in the same way that they had done before. The Miracle Feeds arrangement with Custom and Ideal was not created so as to affect employees covered by a collective agreement, unlike the circumstances before the Board in *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931. Furthermore, this is not a situation where employees of different entities are working together so that it is difficult or impossible to determine who is their employer and thereby describe an appropriate unit for collective bargaining, as was the situation in *Walters Lithographing Company*, [1971] OLRB Rep. July 406.

20. In our view, mere speculation as to what might happen in the future is not sufficient basis to declare that the three entities in this case are one employer. While we have assumed

that there is common control or direction of the activities in question, there is simply an insufficient degree of authority possessed or exercised by Miracle Feeds over the business or labour relations of Custom or Ideal to cause us to grant the declaration requested. See *Caessant Care Nursing Home of Canada Limited*, [1985] OLRB Rep. Jan. 50 at page 51 where the Board wrote, in finding there was no common control or direction:

"... But the specific options reserved to Caessant Care under this arrangement we find to be no more than a customer could normally expect to have access to, either expressly or as a matter of commercial reality, in ensuring that the performance of the contractor continues at all times to meet its general specifications and requirements. We recognize that there is in any business relationship, apart from perhaps fixed-term contracts, the right of termination of the arrangement by the customer which, as a practical matter, requires a contractor to be more or less responsive to any complaints by its customers. The question is whether, on an on-going basis, the contractor really has taken over control and responsibility for the selection, training and supervision of the employee workforce, and is truly independent in making the decisions that it does."

It is not necessary for us to determine if the degree of authority over Custom and Ideal that exists in this case meets the statutory condition of common control or direction. Such a finding and the Board's exercise of discretion are often difficult to separate. Indeed, the Board stated in *Penmarkay Foods*, *supra*, at 1230-31:

"The discretionary power to treat two or more entities as one employer can only be exercised where two criteria are satisfied: the entities concerned must be under 'common control or direction' and they must carry on 'associated or related activities'. When both of these criteria are met, the Board issues a section 1(4) declaration if there are sound industrial relations reasons for doing so. Standing alone, phrases like 'common control or direction' and 'associated or related activities' are linguistically capable of bearing more than one interpretation.... The only way to ... assign a precise meaning to the statutory criteria is by reference to the policy objectives underlying the statutory language."

[emphasis added]

The exercise of the Board's discretion is entirely a function of labour relations policy. In our opinion, the factors the Board considers in determining whether there is common control or direction over two or more entities are also particularly relevant in deciding whether the Board should exercise its discretion under section 1(4) of the Act.

21. The Board has previously examined contracting arrangements that are similar in principle to the relationships before us. In *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293, the Board described the applicability of section 1(4) to a sub-contracting arrangement at pages 1298-99:

"The Board has previously accepted the proposition that sub-contracting relationships can under certain circumstances bring two nominally independent firms within the ambit of section 1(4). As was stated in the *Charming Hostess* case [1982] OLRB Rep. April 582, the more closely a firm which has contracted out work controls when, where, how, by whom and at what place the work is to be done, the more the activities of the two firms will appear to be under joint control or direction. Indeed, the degree of control may be so great as to lead to the conclusion that the firm allegedly contracting-out certain work is in fact the true employer of the individuals performing it, and that they are not employees of the 'sub-contractor' at all. See: *K Mart Canada Limited*, [1983] OLRB Rep. May 649. In addition, a section 1(4) declaration may be appropriate in instances where

a sub-contractor is effectively dominated by the firm letting out the work, and it appears the true purpose of the sub-contract was not to provide the dominant firm with independent managerial or employee skills, but rather to provide it with a separate 'non-union' corporate vehicle with which it could continue performing the same work as before but outside of any collective bargaining obligations. See *J. H. Normick Inc.* [1979] OLRB Rep. Dec. 1176 and *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436."

The Board held that sub-contracting in that case did not give rise to common control or direction over the businesses. The Board also stated at page 1299:

"In assessing the circumstances of the case before us, we consider it noteworthy that there is apparently an accepted practice in the automotive dealership field of contracting out the washing and rustproofing of cars. One can infer from this that the work involved is not viewed as being so integral or 'core' to the operation of a dealership that the management of the dealership must keep direct control over the performance of the work."

22. The Board in *Caressant Care Nursing Home of Canada Limited*, *supra*, also discussed a contracting-out arrangement and the effect of section 1(4) on that arrangement at page 53-54:

"In *Kennedy Lodge*, the Board introduced the terms 'core' and 'peripheral' functions, in commenting upon the question of community perception. ... Without seeking to define any further the terms 'core' and 'peripheral', we would simply observe that the contracting out of the kind of work involved here, in terms of food services and housekeeping services, would not seem to offend the sensibilities of the labour relations community in the way that the purported contracting-out of direct nursing care does. And indeed the history of companies like Versa Services in providing these services within the health care industry of the province makes it difficult for anyone to argue 'surprise' over a development like the present. In any event, as the Board noted at the end of its comments with respect to community perception in *Kennedy Lodge*, the question before the Board and arising under the Act remains one of intent, and of 'control', and we find nothing in the evidence before us to suggest anything but a *bona fide* intent to hand the responsibility for these severable aspects of the Home over to the business organization of Versa Services. Whether these are areas, as they obviously are, which are integral to the continued operation of a nursing home, and with respect to which a strike could obviously cause disruption, and whether as a result the employees engaged in these on-site activities fall under the Hospital Labour Disputes Arbitration Act, as they obviously do, does not assist the Board in assessing on a case by case basis the degree of responsibility given up in a particular 'subcontracting' arrangement, and that remains the issue for the Board under section 1(4) of our Act."

We observe that in this case Miracle Feeds had not previously performed the transportation function with its own employees. Miracle Feeds was not in and did not want to engage in the trucking business before entering into its relationship with Custom and Ideal. The contracting out of trucking services to licenced common carriers or entities which both lease vehicles and provide drivers is quite common.

23. We are also satisfied that the mischief that section 1(4) was enacted to deal with does not exist in the circumstances of this case at the present time. The Board in *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029 suggested the following situations in which a Board declaration under section 1(4) would be appropriate:

"Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer.



So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

So too, in the case where associated or related employers joined in a common enterprise and used one workforce, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented."

24. In summary, we are not persuaded that sound labour relations reasons exist for making the declaration sought by the applicant. Miracle Feeds has no proprietary or financial interest in either Ideal or Custom, and the management of Custom and Ideal is clearly separate from the management of Miracle Feeds. Miracle Feeds had no role whatever in the creation of either Custom or Ideal. Custom is the actual employer of the employees. It decides who is hired, disciplined, and scheduled to work. The collective bargaining rights of employees have not suffered by reason of the relationship between Miracle Feeds and Custom and Ideal nor was any pre-existing collective bargaining structure adversely affected by the arrangement. While Miracle Feeds' status as Custom's only customer is an important factor in affecting the way in which Custom carries on business and how it may deal with its employees, it does not have the kind of significant role in the conduct of Custom's business or labour relations that would cause us to make the declaration requested by the applicant.

25. For these reasons, this application under section 1(4) is dismissed.

#### **DECISION OF BOARD MEMBER, L. C. COLLINS;**

1. I concur with the majority's findings of fact. In my opinion, the wide difference between the economic power held by Miracle Feeds and Custom and Ideal persuades me that Miracle Feeds and Custom and Ideal carry on business under common control and direction.

2. However, I dissent from the majority's refusal to exercise their discretion under section 1(4) of the Act. The arrangement between Miracle Feeds and Custom and Ideal, although clearly undertaken for bona fide business reasons unrelated to any union activity on the part of the employees, is a fragile one. The applicant's bargaining rights should not depend on any corporate manoeuvres that Miracle Feeds or Custom and Ideal might decide to engage in. The applicant's bargaining rights should attach to the economic activity that creates the work performed by the employees of Custom, and not to a corporate entity that may be substituted at any time. Therefore, I would have exercised the discretion under 1(4) to declare that Miracle Feeds and Custom and Ideal are one employer for purposes of the Act.

**1253-85-R** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), Applicant, v. **Noranda Metal Industries Limited**, Respondent, v. International Brotherhood of Electrical Workers, Local 2345, Intervener

**Certification - Practice and Procedure - Representation Vote - Intervener union in pre-hearing certification application making allegation of improper solicitation by applicant union - Request to seal ballot-box denied where Board not satisfied that allegation if established can affect entitlement to pre-hearing vote**

**BEFORE:** *Harry Freedman*, Vice-Chairman and Board Members *P. Grasso* and *M. Eayrs*.

**DECISION OF THE BOARD;** September 9, 1985

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.
4. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

all employees of the respondent at its Fergus Division, Fergus, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period or on a co-operative training program with the University.

5. The intervener requested that the ballot box be sealed until the Board dealt with the allegations raised in its intervention where it stated:

“Organizers on behalf of the Applicant approached employees at the plant during working hours and told them that if they did not sign a card for the Applicant they would have to join the U.A.W. later and \$25.00. [sic]”

6. The Board in *Electrohome Limited*, Board File No. 1150-85-R, decision dated August 26, 1985, dealt with a similar allegation made in a pre-hearing vote certification application at paragraph 6 where it stated:

“That intervention stated ‘Organizers on behalf of the Applicant approached employees at the plant during working hours and told them that if they did not sign a card for the applicant they would have to join the U.A.W. later and pay \$25.00’. Before the Board seals the ballot box in a pre-hearing vote, it must be satisfied that a party to the proceeding has made an allegation or taken a position which, if established, could affect the applicant’s entitlement to have the pre-hearing vote take place. It is not apparent to the Board at this stage of the proceeding that the statement made by intervener #2 is of such a type.”

7. We are similarly not satisfied that the allegations made in this proceeding, if established, could affect the applicant's entitlement to have the pre-hearing vote take place. Therefore we decline to order the ballot box sealed. Should the intervener, or any other party wish to make representations as to whether the Board should seal the ballot box, such party must deliver to the Board and to the other parties in this matter its submissions not later than Friday, September 14, 1985.

8. All employees of the respondent in the voting constituency on the 28th day of August, 1985, who have not voluntarily terminated their employment or who have not been discharged for cause between the 28th day of August, 1985, and the date the vote is taken will be eligible to vote.

9. Voters will be asked to indicate whether or not they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

10. The matter is referred to the Registrar.

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**0513-85-M** Ontario Allied Construction Trades Council, Labourers International Union of North America, Local 607, Applicant, The Electrical Power Systems Construction Association and **Ontario Hydro**, Respondents

**Arbitration - Construction Industry Grievance - Whether grievor entitled to subsistence allowance - Allowances obtained by tendering false receipts - Importance of honesty in employment relationship - Discharge justified**

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *A. Grant* and *W. F. Rutherford*.

**APPEARANCES:** *David Strang*, *Pat Little* and *Gerard O'Leary* for the applicant; *Barry Brown*, *Ivars Starasts* and *L. J. MacIsaac* for the respondent.

**DECISION OF THE BOARD;** September 25, 1985

1. This is a referral of a grievance to the Board under section 124 of the *Labour Relations Act*. The Form 104 Referral which initiated these proceedings indicates that the grievance being referred to the Board for final and binding determination is a grievance dated November 21, 1984 in which Gerard O'Leary (the "grievor") alleges that the respondent Ontario Hydro ("Hydro") violated Article 19 of the applicable collective agreement by failing to pay room and board (also referred to in this decision as "subsistence allowance"). However, at the hearing of this matter on August 29, 1985, the parties advised the Board that during the grievance procedure, they had agreed to have the matter of the grievor's January 17, 1985 discharge arbitrated at the same time as the aforementioned grievance. Thus, it is common



ground between the parties that the Board has jurisdiction in these proceedings not only to determine whether the grievor was entitled to receive subsistence allowance, but also to determine whether Hydro was justified in discharging him.

2. The grievor commenced employment with Hydro in April of 1983. On April 28, 1983, he applied for room and board allowance by submitting an application which contained the following information:

(see over)

personal data	surname (last name):		trade:		
	mr.	"O'Leary"		"labourer"	
	mrs.	given name(s) in full:		employer:	
	miss	"Gerard"		"Ontario Hydro"	
	date of birth:		social insurance no.	marital status:	
	year	month	day		
	"44"	"9"	"26"	"702-144-395"	"married"
definition of regular residence	An employee's regular residence is "the place where an employee maintains a self-contained domestic establishment (a dwelling house, apartment, or similar place of residence where a person generally sleeps and eats) in which he/she resides and for which he/she can show proof of financial commitment in accordance with this form.				
address of regular residence	street & number, apt. no., box no., rural route no.:				
	"311 Mack's Rd"				
	city or town:	Province:	Postal Code:	home telephone no.:	
	"Reserve Mines"	"Cape Breton Nova Scotia"		"902-849-4083"	
(n/a lines and stations)	if the above address is a box no. or rural route, please describe exact location:				
claim either (a) or (b) below					
(a) room and board allowance	<p>I understand that in order to qualify for Room and Board Allowance I must maintain a regular residence. To verify my entitlement I will be required to provide formal documentation by supplying either a lease, letter of proof from landlord, rent receipt, tax notice, deed, mortgage or any other documentation acceptable to the approving authority.</p> <p>(i) I commute daily from my regular residence. <input type="checkbox"/> Yes</p> <p style="text-align: center;">or "597-1559"</p> <p style="text-align: center;">"Joseph O'Leary" "19 Viciene Av" "Ont"</p> <p>I commute daily from ..... street &amp; no. town/city province</p> <p>(ii) I am applying for Room and Board Allowance effective....."28 Apr. 83"..... date</p>				
(b) daily travel allowance					
employee responsibility	I agree to notify my employer and the local EPSCA Office of any change of address within 5 working days of such change and to provide additional information relevant to any change of address.				
declaration	<p>I declare that I have read and understand this form and that all the foregoing information is true and complete. I understand that a false statement regarding my regular residence may be cause for disciplinary action up to and including termination. My signature acknowledges my receipt of a copy of this application.</p> <p>"28 April 83" "Gerard O'Leary"</p> <p>date Signature of</p> <p>applicant Signature of</p> <p>witness</p>				
office use only					

(The information written on that application by or at the request of the grievor has been placed in quotation marks to differentiate it from the printed portions of the form.)

3. The "formal documentation" that the grievor provided to Hydro in support of that application consisted of three handwritten receipts, dated February 1, March 1, and April 1, 1983, respectively. Each of those receipts purported to be signed by "Tom O'Leary" (the grievor's father) and purported to indicate that he had received from the grievor "two hundred & fifty dollars for rent of 311 Mack's Rd." in each of those three months.

4. On the basis of that application and those three receipts, Hydro paid the grievor subsistence allowance totalling \$11,196 in the period from May of 1983 to September of 1984. At the time that application was submitted, it was Hydro's policy to accept such receipts at face value, without verifying their authenticity. However, the "tremendous cost" of subsistence allowance payments subsequently prompted Hydro to take various steps to investigate the validity of some of those payments. That investigation disclosed that both the grievor and his brother Joseph had specified "311 Mack's Rd., Reserve Mines, Cape Breton, Nova Scotia" to be their "regular residence". It also revealed that while employed by a subcontractor at Hydro's Atikokan G.S. site, the grievor had submitted in support of an (earlier) application for subsistence allowance two rent receipts (dated August 1, 1982 and September 1, 1982) which also purported to be signed by "Tom O'Leary". However, the "Tom O'Leary" signature on those two receipts was distinctly different from the "Tom O'Leary" signature on the three receipts submitted by the grievor to Hydro in April of 1983. When management confronted the grievor with the disparity between those signatures on August 28, 1984 at a meeting at which he had union representation, the grievor became very angry. After uttering some vulgarities which need not be repeated in this decision, the grievor pounded the table and vociferously asserted that he was "morally entitled" to receive subsistence allowance. The grievor did not provide management with any explanation for the disparity between the signatures during that meeting or at any other time prior to the hearing of this matter. However, he did undertake to provide Hydro with further documentation in support of his entitlement to subsistence allowance. Hydro requested that the documentation be provided in the form of a deed or affidavit. However, the grievor provided the following letter dated August 30, 1984, from his brother Ted:

To Whom It May Concern:

This is to confirm and hopefully clarify an apparent problem with regard to my brother Gerard's "living out allowance".

Up to about July, 1982, Gerard lived with us for approximately seven years. He paid "board" which varied depending on his ability to pay. In addition to "board", Gerard also shared the cost of not your every day maintenance and repair expenses, such as replacing a dryer motor, etc.

Our basement is completed for living. Gerard's room is in the basement and it is available to him at any and all times.

When Gerard decided to go to Ontario for work, he knew the loss of his contribution to the family income would place a strain on my Dad's personal budget. My father was on a pre-retirement pension due to illness at the time. Fearing the loss of his room to a boarder or roomer and yet not knowing what his own financial position would be in Ontario, Gerard arranged with my father to hold his room with the understanding he would send what



he could whenever he could, but definitely it would be something. A loose arrangement like this, within a large and close family such as ours, is not unusual.

I do not know how much Gerard sent to my father. However, since his death, June 20, 1983, Gerard has sent or given me personally \$7155.78 most of which was used to maintain the house and our home. Keep in mind an even greater need exists now that we are without my father's income, as small as it was. In fact, some interim arrangements have been made with my brother Joe which will provide us with some additional financial help.

A few facts; my Dad died without a will; there are nine heirs; the estate is still opened and I am the administrator.

To finalize I wish to make three statements:

(1) There will always be a room for Gerard in this or any other house that I own or have control over; not only because he is my brother, but also because of the past and present financial assistance he has given and is giving to the maintain [sic] and upkeep of the house and family.

(2) I do not know what purely legal rights Gerard would have to a room in the house, because any situation can give rise for and to a question of litigation. However, from a moral viewpoint he has a total and complete right simply because he has paid for it and still is paying for it.

(3) I am willing to swear before a court of law as to the validity of the content of this letter. I am sure I can document my proof if required by a court. But, quite frankly, I am not going through the trouble, unless required to do so by a court of law.

Sincerely yours,

"Thomas Ted W. O'Leary"

5. Since the contents of that letter did not convince Hydro of the grievor's entitlement, payment of subsistence allowance to him ceased as of September 12, 1984. However, no disciplinary action was taken at that time because the grievor convincingly asserted that he could produce further documentation in support of his claim. That documentation took the form of a further letter from his brother, and a number of statements, invoices, and cancelled cheques in respect of payments made by Ted O'Leary. It also included bank "telephone transfer" slips which indicated that the grievor had transferred from his account in Atikokan, Ontario, to his brother's account in Sydney, Nova Scotia, \$250 in May of 1983, \$740 in June of 1983, \$1,100 in October of 1983, \$250 in March of 1984, and \$250 in April of 1984. The letter, which was dated December 4, 1984, read:

To Whom It May Concern:

Enclosed are copies of statements, invoices and cancelled cheques for services, maintenance, repair and general up-keep of our home. Of course there were many other expenses, which were put on one of four charge cards. Only a court will force me to take the time to locate these costs.

The period covered is generally June/83 to present date.

Also attached are copies of the legal papers opening my Dad's estate and appointing myself as Administrator.

Some of these bills were paid totally from the money Gerard sent home, other [sic] were paid partly with his money, and still other [sic] none at all was used.

Gerard was sending home about \$300.00 a month and quite frankly what I do with it is my business. However it is used to maintain the house. But since Ontario Hydro stopped paying him the "living out allowance", I have received nothing from him since Aug/84 and therefore have been looking after his part of the above mentioned costs. I can not afford to continue this extra expense much longer. Therefore, if the matter is not finalized shortly, it is my intention to seek legal advice as to whether or not, I can bring an action against Ontario Hydro for the amount due me to date about \$1,000.00. A word of caution, it would be wise for Ontario Hydro not to view this as an idle threat, but a promise from an irate Irishman with a temper to match. Besides, I may even include the "Union" in the same action as their negligence, refusal to act and procrastination may have been the result of my financial loss.

Sincerely yours

"Ted O'Leary"  
Administrator

6. After considering that material and all of the circumstances, management concluded that the grievor was not entitled to subsistence allowance and that he should be discharged for obtaining subsistence allowance under false pretences. Accordingly, the grievor was given the following memo on January 17, 1985:

This is to advise you of your termination for cause effective this day, for reasons of fraudulent behaviour in obtaining money (Subsistence Allowance) under false pretenses.

Respectfully,

"D. B. Reid"  
Assistant Divisional  
Superintendent - Acting

7. It was the grievor's evidence that he had lived at 311 Mack's Rd. (also known as 311 Neville Street) from 1972 to the summer of 1982, with the exception of a period of approximately two years from 1975 to 1977 (when he was living with his wife in a nearby house prior to their separation). The other persons living in the house situated at 311 Mack's Rd. were the grievor's father, his brother Ted, his sister Linda, and his first cousin Patty Duke Bennett. In his testimony before the Board, the grievor confirmed the accuracy of the information contained in his brother Ted's letters of August 30 and December 4, 1984. He also testified that when he was living at 311 Mack's Rd., he paid \$75 a week for his "grub". It was his evidence that prior to his father's death, he (the grievor) paid one-third of any bills that came in, such as the cost of repairing appliances. It was also his evidence that he purchased a stereo for the home and paid half of the cost of a pool table. He told the Board that his brother Ted had taken over the management of his finances under a power of attorney while he was hospitalized in Halifax in 1977 as a result of a life-threatening accident. After the grievor left the hospital, Ted continued to manage his finances because of his recurring problems with alcoholism. During the periods when he was not living at 311 Mack's Rd., he ceased to pay the aforementioned \$75 a week, but sent money to Ted from time to time to be dispersed at Ted's discretion to meet various "costs of the family", such as tuition for

Patty Duke Bennett, the grievor's child support payments, and expenses incurred in maintaining and repairing 311 Mack's Rd. The grievor also testified that there is a bedroom in the basement of the house at 311 Mack's Rd. that is "his room", and that he keeps a television, a VCR, and some clothes there. He conceded in cross-examination that until the time of his death on July 20, 1983, his father was the legal owner of 311 Mack's Rd., although he suggested that his father could not have remained the legal owner without financial assistance from himself and his brother Ted.

8. When a three or four month job with Nova Scotia Power ended in July of 1982, the grievor came to Ontario to visit his brother Joe, who was working for a subcontractor at Hydro's Atikokan G.S. site. During that visit, the grievor obtained through the union a six-week job at Atikokan with another Hydro subcontractor. After that job ended, the union referred the grievor to a job in Kenora, but he did not report for work because he was "on the bottle". He went to Regina near the end of September of 1982 and began to collect unemployment insurance. While the grievor was in Regina, his brother Ted sent him \$1,000. During the last three months of 1982 the grievor also spent time in Prince Albert, Calgary, and Edmonton, before returning to 311 Mack's Rd. at Christmas time. He remained there until the end of February of 1983, when he returned to Thunder Bay. While he was in Thunder Bay, Ted sent him \$350 to pay his way back to Nova Scotia. However, the grievor used that money to go on a drinking spree and "ended up in a detoxication centre". After spending five weeks in a hospital alcoholism programme, the grievor paid his union dues which had fallen into arrears, and was referred to Hydro's Atikokan G.S. site in April of 1983. After accepting that referral he submitted the aforementioned application for room and board allowance. He later submitted the aforementioned three receipts in support of that application.

9. After conferring prior to the commencement of the hearing of this referral, counsel advised the Board that it was an agreed fact between the parties that the three receipts which purported to be signed by Tom O'Leary were in actuality made out and signed by Joseph O'Leary, the grievor's brother. In his testimony before the Board, the grievor stated that he initially thought that he would be able to document his claim for subsistence allowance by relying on the two receipts that he had submitted to the Hydro subcontractor in support of his earlier application for subsistence allowance. However, just before the time that subsistence allowance cheques were due to be issued, he spoke with his union steward, who advised him that he would have to submit new receipts in support of his application. The grievor testified that he then approached his brother Joseph, who was also working at the Atikokan G.S. site, and asked him to telephone their father to request that he send a receipt. When the grievor went home after work, Joseph handed him the aforementioned three receipts. It was the grievor's evidence that Joseph told him "I called Dad and Dad told me to sign them for you." The grievor further testified that he telephoned his father that night to confirm that information before submitting the receipts to Hydro the following day. He also told the Board: "I didn't feel that the receipts meant anything and I don't think that [my father] thought they meant anything. I never got a receipt for the money I paid him. I never asked for one. It was a hell of a lot more than \$250 a month."

10. The grievor conceded in cross-examination that at the time he submitted the three rent receipts to Hydro, he knew that he had not sent any money to his father or Ted in February or March of 1983, and in fact thought that he was "using their money", as they had been sending him funds to supplement his unemployment insurance payments. However, it was also his evidence that Ted later advised him that he (the grievor) did not owe Ted any



money for that period as, unbeknownst to the grievor, Ted had received and cashed cheques payable to the grievor in respect of the aforementioned accident and the cost of certain related nursing care. However, he conceded that Ted did not give him that information until some time during the summer of 1983 and that at the time he submitted the receipts, he believed that he had not made any contribution to the 311 Mack's Rd. household for February or March of 1983, although he later attempted to backtrack from that concession by asserting that at the time he submitted those receipts, he thought that he owed his brother one half of the maintenance and repair costs for 311 Mack's Rd. during that period. The grievor conceded that the idea of the receipts was to make it appear as if he had a set of receipts from Tom O'Leary. He also admitted that he submitted them to Hydro in that form because he knew that that was what was needed in order to claim subsistence allowance.

11. Counsel for the employer submitted that the grievor's discharge was justified on the ground of fraud, in that he had submitted forged documents in support of his subsistence allowance claim with intent to deceive Hydro, and received subsistence allowance totalling \$11,196 on the basis of those receipts. He urged the Board to reject the grievor's belated explanation of why his brother signed his father's name on the receipts, and noted that even if that explanation was accepted, the receipts would still be false in that the grievor did not in fact pay any rent in respect of 311 Mack's Rd. Counsel submitted that the grievor was not entitled to receive any subsistence allowance because he did not maintain a self-contained domestic establishment in which he resided and for which he could show proof of financial commitment in accordance with the "Application for Daily Travel/Room and Board Allowance". In addition to asking the Board to uphold the discharge of the grievor and dismiss his grievance, counsel requested that the Board order the grievor to make full restitution to Hydro for the subsistence allowance paid to him.

12. Counsel for the applicant submitted that the grievor had a "financial commitment" to the residence at 311 Mack's Rd. in that he periodically transferred substantial sums of money to his brother Ted to be used for purposes that included payment of a proportion of the costs incurred in respect of that residence. He further contended that the discharge of the grievor was unwarranted since the grievor was entitled to receipts which reflected his financial commitment. It was his submission that when Hydro confronted the grievor with this "alleged forgery", the grievor did not deny the facts. He also submitted that the fact that management did not discharge the grievor until approximately five months later indicated that management did not view those receipts as forgeries in the sense of a serious misdeed against Hydro. Accordingly, counsel asked the Board to reinstate the grievor with compensation for lost wages and benefits, including subsistence allowance. In response to Hydro's request that the Board order the grievor to make restitution in respect of the subsistence allowance received from Hydro, counsel for the applicant submitted that the Board was without jurisdiction to make such an order in these proceedings. In this regard, he noted that Hydro had not filed a grievance respecting restitution, and that any such grievance would now be untimely.

13. The collective agreement provision pertaining to subsistence allowance that was in force at the time of the grievor's application for same provided as follows:

## Article 19

GENERATION PROJECTS DAILY TRAVEL  
ALLOWANCE AND ROOM AND BOARD

• • • •

## ROOM AND BOARD

19.2 The following conditions will apply for employees whose regular residence\* is more than 97 radius kilometers from the project:

- (a) An Employer may supply either:
  - (i) free room and board in camp or a good standard of board and lodging within a reasonable distance of a project; or
  - (ii) a subsistence allowance.
- (b) An employee may exercise his option not to stay in a camp or accept free room and board. An employee who exercises this option shall receive a subsistence allowance as follows, subject to 19.2 (c) below:

• • • •

- (ii) When an employee's regular residence is more than 161 radius kilometers from the project, he shall be paid a subsistence allowance of \$28.00 per calendar day subject to the following:

An employee will not be entitled to subsistence allowance for a Saturday, Sunday or Statutory Holiday if he is absent from work on the last scheduled working day preceding or the first scheduled working day following a Saturday, Sunday or Statutory Holiday unless, for a legitimate reason, he receives the approval of the project medical attendant or an authorized representative of his Employer. Such permission shall not be unreasonably denied.

- (c) During an extended shutdown period, subsistence allowance will only be paid for days worked or reported for.

\* An employee's "regular residence" is the place where he maintains a self-contained domestic establishment (a dwelling house, apartment or similar place of residence where a person generally sleeps and eats) in which he resides and for which he can show proof of financial commitment in accordance with the "Application for Daily Travel/Room and Board Allowance" as agreed to by the parties.

The applicable subsistence allowance provision in the current collective agreement differs from that provision in a number of respects, but those differences are immaterial to the disposition of the issues before us in these proceedings.

14. Also pertinent to the instant proceedings is Article 29.7 (which is identical in both the collective agreement currently in force, and its predecessor):

GRIEVANCE PROCEDURE

• • • •

29.7 Alleged unjustified termination, discharge, suspension or disciplinary action may be grieved beginning at First Step.

15. Having carefully considered the able submissions of counsel and the totality of the evidence adduced before us in these proceedings, we have concluded that the grievor was not entitled to receive subsistence allowance as he did not maintain "a self-contained domestic establishment... for which he [could] show proof of financial commitment in accordance with the 'Application for Daily Travel/Room and Board Allowance' as agreed to by the parties" within the meaning of Article 19.2. That application, which is incorporated into Article 19.2 by reference, specifies that to verify entitlement to subsistence allowance, an employee is "required to provide formal documentation by supplying either a lease, letter of proof from landlord, rent receipt, tax notice, deed, mortgage or any other documentation acceptable to the approving authority." The types of "formal documentation" listed in that sentence provide a clear indication that the parties intended subsistence allowance to be payable only when an employee could prove a financial commitment of the type that would arise when the employee rented a self-contained domestic establishment (and was thus in a position to provide the employer with a "lease", "letter of proof from landlord", or "rent receipt"), or was purchasing or had purchased a self-contained domestic establishment (and was thus in a position to provide the employer with a "tax notice", "deed", or "mortgage"). It is evident that the grievor was aware of the type of financial commitment that had to be proved and, accordingly, presented the aforementioned receipts, which purported to indicate that he had paid Tom O'Leary \$250 a month in February, March, and April of 1983 for *rent* of 311 Mack's Rd. However, it is clear from the evidence that the grievor was not in fact renting a self-contained domestic establishment at 311 Mack's Rd., and had not in fact paid rent to Tom O'Leary or to anyone else during those months, or at any other material time.

16. The grievor's case derives no assistance from the inclusion of the phrase "any other documentation acceptable to the approving authority", as Hydro did not find the "documentation" submitted by the grievor to be acceptable, and their conclusion in that regard was not in our view unreasonable in that the letters, telephone transfers, and other documents submitted by the grievor after August of 1984 did not establish that the grievor had a "financial commitment" to 311 Mack's Rd. of the type contemplated by Article 19.2. While the grievor sent money to his brother Ted from time to time to be disbursed at Ted's discretion to meet various costs of the family, such as tuition for his first cousin, child support payments, and expenses incurred in maintaining his father's home at 311 Mack's Rd., those gratuitous payments do not in our view constitute a "financial commitment" of the type required to entitle an employee to subsistence allowance under Article 19.2.

17. We shall next consider the matter of the grievor's discharge. If the grievor had informed Hydro of the true facts concerning the financial arrangements with respect to the maintenance of 311 Mack's Rd. at the time he applied for subsistence allowance, no disciplinary action would have been justified. However, by submitting in support of his application receipts that he knew to be false in that "Tom O'Leary" had not in fact signed them, and also in that the grievor had not in fact paid any rent in respect of 311 Mack's Rd., the grievor engaged in serious employee misconduct. In this regard, it is noteworthy that the



declaration which the grievor signed as part of his application for subsistence allowance emphasized the need for "true and complete" information, and stipulated that a false statement "may be cause for disciplinary action up to and including termination".

18. The importance of honesty in the context of employer-employee relationships has been recognized in the arbitral jurisprudence. For example, in *Re Phillips Cables Ltd. and International Union of Electrical, Radio and Machine Workers, Local 510*, (1974) 6 L.A.C. (2d) 35, at page 37 (Adams), it was the unanimous view of a board of arbitration that "honesty is a touchstone to viable employer-employee relationships". In that case, which involved falsification of production records, the board of arbitration also noted that "employee good faith and honesty is one important ingredient to both industrial democracy and the fostering of a more co-operative labour relations climate." See also in this regard the following cases to which we were referred by counsel for the employer: *Re Forrester and Treasury Board (Post Office Department)* (1981), 2 L.A.C. (3d) 182 (O'Shea); *United Steelworkers of America, Local Union No. 6709 and The Cooper Tool Group Limited*, an unreported award dated September 30, 1980 (O'Shea); and *Re Treasury Board (Department of Supply and Services) and Deschenes and Pharand* (1978), 20 L.A.C. (2d) 388. In the *Cooper-Tool* case, the arbitrator upheld the discharge of an employee (with six years' seniority) for forging his supervisor's signature on a special pass form authorizing the removal from the employer's premises of a plastic container that was of little, if any, value to the employer, even though the supervisor testified that if the employee had requested such a pass, he would have signed it. In the *Forrester* case, the P.S.S.R.B. Adjudicator upheld the discharge of an employee with five years' seniority for forging a physician's signature on three medical certificates. A discharge for falsification of medical certificates was also upheld by a P.S.S.R.B. Adjudicator in the *Deschenes and Pharand* case. (A second grievor was reinstated with a two week suspension in that case, in view of the presence of certain mitigating factors.)

19. In the present case, the grievor obtained subsistence allowance payments of over \$11,000 on the basis of receipts which to his knowledge falsely indicated that they were signed by Tom O'Leary and that the grievor had paid \$250 per month for rent of 311 Mack's Rd. in February, March, and April of 1983. As indicated above, that fraudulent action constituted serious employee misconduct. Such abuse of negotiated benefits is harmful not only to the employer, which has paid out a substantial sum that may be difficult, if not impossible, to recover, but also to the union and the other bargaining unit employees whom it represents, in that such abuse may (during the course of collective bargaining) form part of an employer's argument for reducing, eliminating, or not improving benefits of that type. The grievor had worked for Hydro for less than two years at the time of his discharge. Moreover, his fraudulent action occurred near the commencement of his employment with Hydro, and continued to provide him with substantial unwarranted benefits for a period in excess of sixteen months. Finally, we note that it was not until the hearing of this matter that the grievor provided any explanation concerning the forged signature on the receipts in question, and in providing that belated explanation, he expressed no remorse for having presented those false receipts to his employer.

20. Having regard to all of the circumstances, we are satisfied that the discharge of the grievor was justified and that this is not an appropriate case in which to exercise our discretion to substitute a lesser penalty. For the reasons set forth above, the grievance dated November 21, 1984 is hereby dismissed. However, no order of restitution will be made in respect of the \$11,196 paid to the grievor by Hydro as we agree with counsel for the applicant that we do not have jurisdiction in these proceedings to make such an order.

**0689-85-R Ontario Secondary School Teachers' Federation, Applicant, v. The Oxford County Board of Education, Respondent**

**Certification - Trade Union - "employed in an educational capacity" pre-requisite for membership in OSSTF - Whether secretarial, clerical and support staff in education sector eligible for membership - Board holding membership restricted to those employed in professional educational capacity**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *J. A. Ronson* and *B. L. Armstrong*.

**APPEARANCES:** *Maurice A. Green*, *Jim Forster* and *Audrey Honeyborne* for the applicant; *B. H. Stewart*, *Q.C.*, *John Young*, *George Hammond* and *Louanna McGowan* for the respondent.

**DECISION OF THE BOARD;** September 19, 1985

I

1. The name of the respondent is amended to read: The Oxford County Board of Education.
2. This is an application for certification.
3. Having regard to the recent decision of the Board in the *Board of Education for the City of York*, [1984] OLRB Rep. Sept. 1279, and *The Board of Education for the City of York No. 2*, [1985] OLRB Rep. May 767, the respondent does not dispute, and the Board finds, that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The issue which the parties put before us is not whether the applicant "OSSTF" is a trade union within the meaning of the Act. That question was resolved in the applicant's favour in several earlier Board proceedings, and the respondent here does not seek to challenge that result. The question put to the Board is whether, having regard to the terms of its constitution, OSSTF can actually accept into membership the persons whom it here seeks to represent. Counsel for the parties agreed to address this question first, since its resolution might make it unnecessary to address any of the other issues raised in this application. However, the parties do not agree upon the interpretation of the OSSTF constitution. Counsel for OSSTF argues that the constitution should be given a liberal interpretation so as to broadly embrace *any* employees in the "education sector" including the secretarial and clerical support staff potentially affected by the present application. The thrust of the OSSTF argument is that it is no longer exclusively a "professional organization" but rather a "union" of workers in the "education sector." The respondent argues that the OSSTF constitution contemplates an organization of *teachers*, and that secretarial support staff are not entitled to membership. In the respondent's submission, OSSTF is an organization of *professional educators*, which cannot, and was never intended to represent clerical employees. The principal clause in issue is OSSTF by-law 2 which reads as follows:

By-Law 2 - Membership

Sec.1 -Types of Membership

(a) Active Members shall include:

- (1) Statutory members, who shall be: members of O.T.F.; legally qualified to teach in a secondary school; under contract in accordance with part IX of The Education Act; not employed as an inspector, or as an instructor in a teacher-training institution; and are employed for a period exceeding one month.
- (2) Non-Statutory members, who shall be *employed in an educational capacity* by a board of education or educational institutional offering secondary school credits in Ontario. The enrolment as active members of any group of *educational employees* who are not statutory members shall require the prior approval of the Provincial Executive.

(emphasis added)

## II

5. At the present time, OSSTF represents about 35,000 secondary school teachers employed by various boards of education across Ontario. Most of these teachers are "statutory members" because they are required by statute to be members of OSSTF, and under the *School Boards and Teachers Collective Negotiations Act 1975*, ("Bill 100"), R.S.O. 1980, c.464, OSSTF is their designated collective bargaining agent. Recently, OSSTF has also taken into membership a number of other professionally qualified "occasional" or "supply" teachers who are called upon, from time to time, to "fill in" for OSSTF's statutory members when the latter are sick, disabled, on pregnancy leave, or otherwise unable to carry out their assigned teaching responsibilities. These "occasionals" are qualified teachers with established Ministry of Education certification, but they are not "*statutory members*" because they are not required by law to belong to OSSTF nor are they represented by OSSTF under Bill 100. They are active members of the teaching profession whose employment relationships happen to be governed by the *Labour Relations Act*.

6. None of the persons whom OSSTF seeks to represent in this case are "teachers". The employees in the proposed bargaining unit include such classifications as: public school secretary, library clerk, stenographer, film clerk, senior purchasing secretary, accounts payable clerk, clerk typist-stenographer, purchasing clerk, secondary school secretary, secretary to plant operations, and maintenance department clerk. None of these individuals has a teaching role, nor could they even be described as "professional" employees. They have no direct involvement in the teaching-learning process, nor do they provide ancillary "professional" skills (like those of a guidance counsellor) to assist students to achieve their educational objectives. No doubt, they do have occasional contact with students, but they can probably most accurately be described as clerical "support staff".

7. Apart from the present application, OSSTF has never offered membership to the secretarial, clerical, custodial, maintenance, or other support staff employed by a board of



education. Such employees are typically represented by general unions, such as the Canadian Union of Public Employees. Obviously, the clerical support staff provide important services without which it would be difficult to maintain an efficient overall programme of instruction, and in a general sense they are undoubtedly employed "in the education sector", but one would not ordinarily say that they were employed in an "educational capacity". They do not teach students, nor do they contribute directly to the students' intellectual or social development, or the attainment of educational objectives.

8. Since the phrase "employed in an educational capacity" appears in the relevant by-law, and may be important for the decision we have to make in this case, the Board permitted the applicant to adduce evidence concerning its origins - reserving as to the weight (if any) to be given to it. The by-law is a relatively new one, and the Board was of the view that this evidence might arguably be of some assistance in construing the provisions in the OSSTF constitution, which are the focus of the current controversy. If, as OSSTF argued, its constitution had been specifically amended so that it was no longer a teachers' organization and could potentially embrace all employees "in the education sector", the Board determined (without objection from the respondent) that it might be helpful to hear about where the amendment came from.

9. Jim Forster, the associate general secretary of OSSTF, explained that the "provincial assembly" of OSSTF is its senior policy-making body. In effect, it is the OSSTF "parliament". Between meetings of the assembly, there is a standing "provincial council" of OSSTF, and between meetings of the provincial council, OSSTF business is conducted by the provincial executive.

10. The amendment to the by-laws which permits "non-statutory" members was passed in March 1984. Mr. Forster testified that its origin was an omnibus motion endorsing the general principle of organizing all *unorganized teachers*. The focus was upon qualified *teachers*, such as supply teachers, who were then unrepresented. The delegates were of the view that such *teachers* should be represented by OSSTF if that was their wish. There was no consideration or debate about admitting into OSSTF membership clerical or other support staff with no certification, professional training, or direct role in the teaching/learning process.

11. Mr. Forster expressed the opinion that although the debate in the assembly was about *unorganized teachers*, the wording of the by-law is broad enough to encompass virtually all employees working in what we have loosely described as the "educational sector". It is not restricted to teachers, or professional educators. But there is no formal decision of the OSSTF provincial council or the assembly supporting this position; and while the words of the by-law must obviously speak for themselves, we have some difficulty accepting that the delegates to the OSSTF provincial assembly intended, by a stroke of the pen, to turn a professional organization like OSSTF into a general union (like CUPE or OPSEU or the Teamsters) offering membership and the right of full participation to both professional teachers (albeit *unorganized* ones like the supply teachers), and unskilled workers with no professional qualifications or teaching role at all.

12. Mr. Forster told the Board that in anticipation of an expanded organizing role for OSSTF, the provincial executive has decided to extend to non-statutory members - including the clerical employees in issue here - the right to select delegates to the annual OSSTF provincial assembly in accordance with a formula based on "full-time equivalent employment".

As we understand it (the documents were requested, but not filed with the Board), this means that the 75 or so clerical support staff affected by this application would have a voice in the selection of delegates to the OSSTF provincial assembly equivalent to that of an equal number of contract teachers, or a much much larger group of part-time or occasional teachers (who by definition are only used to a limited extent or from time to time). As we have already noted, we have no evidence about how the rank and file delegates to the OSSTF provincial assembly may have regarded this proposition, given the fact (as Mr. Forster candidly conceded) that the sole focus of concern and discussion in March 1984 was the plight of unorganized *teachers*.

13. In any event, whatever the delegates' intentions may have been, we do not think that the language of the by-law, when read in context, supports the assertion that membership in OSSTF can be extended to employees of the kind affected by the present application. The phrase "employed in an educational capacity", which is a prerequisite for membership, simply cannot be stretched that far. When the constitution is read as a whole, it quickly becomes apparent that the phrase is intended to mean "employed in a *professional* educational capacity" - not simply as a clerk or custodian.

### III

14. The objects of OSSTF are spelled out in its constitution. They include [to quote] "first and foremost" [the protection] of its members, both individual and collectively in *their profession*. In addition, OSSTF intends: "to promote a high standard of *professional ethics* and a high standard or *professional competence*; to secure for *teachers* active participation in formulating educational policies and practices affecting secondary schools; to work toward control of *our [teachers'] professional destiny*; [and] to promote political action to ensure that legislation regulating educational structures and policies is in the best interest of *teachers*, students and the community". On the surface, none of these fundamental objects appear to be readily applicable to clerks, secretaries or stenographers.

15. Under by-law 3, OSSTF maintains a membership pledge, a statement of ethics, a bill of rights for *teachers* and a set of principles of *professional conduct*. The membership pledge involves an undertaking to "maintain the highest degree of professional competence" and to "always uphold the honour, dignity and ethical standards of *my profession*". The statement of ethics involves the assertion that "a teacher should present a practical illustration of scholarship and self-discipline...". The principles of professional conduct are framed with reference to the "supreme importance of effective learning and teaching" so that "the *member* shall endeavour at all times to enhance public regard for the teaching profession and to discourage untrue, unfair or exaggerated statements with regard to teaching". There are also comments respecting the importance of "stimulating in students the spirit of inquiry and helping each student realize his or her potential".

16. The Bill of Rights for teachers, as one might expect, deals with *teachers*. Indeed, if one thumbs through the by-laws and related material contained in the OSSTF 1984-85 handbook, it is difficult to find anything that does not relate solely to *teachers*. To put the matter another way, it is difficult to find very much which *does relate* to the position of clerical or other support staff whom counsel here argues can be extended full membership in OSSTF.

The titles of the by-laws and policy statements speak for themselves. To pick a few at random we note by-law 5 - "representation of and support for a member in a professional difficulty with a board of education or other external agency"; by-law 6 - "Counselling and Mediation Procedures for Dealing with Disputes Affecting the Professional Relationship between Members"; the collective bargaining tenure policy; the existence of a *professional standards and practices* council; the many regulations governing the administration of certification; the policy on *teacher* benefits (this in large red letters); the statement of "legislation relevant to members" (this also in large red letters) referring to the *Teaching Profession Act*, the *Education Act*, and Bill 100.

17. We need not multiply the examples. The whole thrust of the constitution, by-laws, and policy statements suggests that the phrase "employed in an educational capacity by a board of education" means employed *as a teacher*. While one might conceivably "stretch" the meaning to encompass other uncertified professionals employed in an educational capacity (we make no ruling in this regard one way or the other), the phrase cannot plausibly be construed to envisage membership in OSSTF by the target group affected by this certification application. The weight of the evidence suggests precisely the contrary, and it is conceded that OSSTF has no established practice of admitting non-teachers into membership so as to trigger the provisions of section 103 of the Act which reads:

Where the Board is satisfied that a trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its Charter, constitution or by-laws, the Board, in determining whether a person is a *member* of a trade union, need not have regard for such eligibility requirements.

#### IV

18. The issue put before the Board by the applicant and respondent is whether, on a fair reading of the OSSTF constitution, the employees in the proposed bargaining unit are eligible for membership in OSSTF. For the reasons set out above, we have concluded that the OSSTF constitution does not envisage or permit membership of the employees in the position of those in the proposed bargaining unit. It is unnecessary to speculate about the potential result if some future provincial assembly of OSSTF should specify in clear and unequivocal terms that OSSTF is no longer to be a professional organization of *teachers*, but intends to broaden its base so as to become a kind of "industrial union" on the model of the Steelworkers, Autoworkers or Teamsters encompassing all workers in the education sector.

19. In light of the parties' characterization of this "preliminary issue" and the Board's decision on the question put to it, the parties are directed to advise the Registrar within 14 days whether, in all the circumstances, this proceeding should now be terminated.

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**1242-85-R** Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Applicant, v. Bidwell Investments Limited c.o.b. as **President Motor Hotel**, Respondent

**Abandonment - Adjournment - Request for adjournment denied - Union obtaining certification and signing collective agreement - No negotiations, grievances or attempts to represent employees for twelve years - No contact with employees - Board finding bargaining rights abandoned**

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *K. Rogers* and *A. Grant*.

**APPEARANCES:** *L. Steinberg* and *M. Hoffmann* for the applicant; *John W. Woon* and *Kenneth C. Stonley* for the respondent.

**DECISION OF THE BOARD;** September 6, 1985

1. The name of the respondent is amended to "Bidwell Investments Limited c.o.b. as President Motor Hotel".

2. At the commencement of the hearing of this application for certification on September 6, 1985, counsel for the respondent requested that the proceedings be adjourned to afford him a further opportunity to attempt to locate a copy of a collective agreement (dated June 9, 1968) that he alleged to be still in force between the parties to this application. It was his position that the contents of that collective agreement could be of assistance to the Board in determining whether the applicant had abandoned its bargaining rights in that the contents of the collective agreement might be "very unfavourable" and might, therefore, support an argument that a desire to get out of those unfavourable terms provided the basis for the applicant's position that it had abandoned its bargaining rights. Counsel for the applicant opposed that request for an adjournment. It was his position that the contents of the collective agreement would not be relevant to the issue of whether the applicant had abandoned its bargaining rights. Moreover, he advised the Board that he was prepared to stipulate that the terms of the collective agreement are unfavourable by today's standards.

3. The usual practice of the Board is to grant an adjournment only on the consent of all of the parties to a proceeding, or where a request for an adjournment is based on circumstances which are completely beyond the control of the party making the request and where to proceed would seriously prejudice such party. (See, for example, *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138, and the Board and Court decisions referred to therein.) Having regard to that practice, which recognizes the great importance of expedition to the efficacious administration of the *Labour Relations Act*, the Board, after recessing to consider the submissions of the parties, made the following oral ruling:

Having considered the submissions of the parties, we are unanimously of the view that the respondent's request for a one week adjournment should be denied. Counsel for the respondent seeks that adjournment in order to have more time to attempt to locate a copy of a collective agreement entered into by the parties to this application or their predecessors in or about 1968. Counsel submitted that if the terms of that collective

agreement are unfavourable, that might be relevant to the Board's decision as to whether or not the applicant has abandoned its bargaining rights. However, counsel for the applicant has advised the Board that he is prepared to stipulate for the purposes of this application that the terms of that collective agreement are unfavourable by today's standards. It is also apparent from the letter of agreement dated July 21, 1971 that has been filed with the Board by the respondent that the parties or their predecessors agreed that that collective agreement would operate from year to year until the stipulations set out in paragraph 1 of that letter of agreement had been complied with by the union. Neither party has suggested that those stipulations have been complied with. Thus, it is apparent that, irrespective of what its contents may be, that collective agreement will be a bar to the present application unless, as contended by counsel for the applicant, the applicant has abandoned its bargaining rights, which is a question of fact concerning which the contents of the collective agreement are not (on the basis of the submissions made by counsel for the respondent) relevant, with the possible exception of the aforementioned stipulated fact. Accordingly, we will proceed to hear the evidence and submissions of the parties concerning the issue of abandonment.

4. The only evidence adduced concerning that issue was the testimony of Manfred Hoffman, who was called as a witness by the applicant. The respondent elected to call no evidence in these proceedings. After hearing that evidence, and the submissions of the parties concerning the abandonment issue, the Board made the following oral ruling, which is hereby confirmed:

In March of 1968, the Board (in File No. 14254-67-R) certified the applicant as bargaining agent for "all employees of the respondent [President Motor Hotel] at Sudbury, save and except hotel, dining room, kitchen, and housekeeping managers, persons above these ranks, and office, registration desk and telephone staff, maintenance staff, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week, and persons covered by the subsisting collective agreement between the applicant and the respondent" (see [1968] OLRB Rep. March 1145).

Pursuant to that certificate, the applicant entered into a collective agreement dated June 9, 1968 with the President Motor Hotel. The terms of that collective agreement are not before the Board in these proceedings in that the parties have been unable to locate a copy of it. However, it can reasonably be inferred from the evidence before us that one of the terms of that collective agreement was a requirement that the employer deduct and remit union dues, in that such remittances were made each month until July of 1971.

On July 21, 1971, Retail, Wholesale and Department Store Union Local 579 entered into the following "Letter of Agreement" with Caswell Motor Hotel, Ambassador Motor Hotel, and President Motor Hotel:

1. This is to confirm the agreement reached on the date hereof that negotiations between the above noted parties covering the employees in the bargaining unit under the Collective Agreements at the (Ambassador Motor Hotel dated June 9, 1968); at the (Caswell Motor Hotel dated July 25, 1968); and the (President Motor Hotel dated June 9, 1968) will be suspended until the majority (50% or more) of the Sudbury hotels have been certified under the Ontario Labour Relations Board by the Union covering employees other than those covered by the master beverage room and cocktail lounge Collective Agreement [sic].
2. Further it is agreed and understood that the present Collective Agreement in existence, as referred to above, shall continue to operate and shall do so from year to year until the stipulations set out above have been complied with by the Union.

Dated at SUDBURY, ONTARIO this 21st day of JULY 1971.

The sole witness called in these proceedings with respect to the question of abandonment was Manfred Hoffmann, who has been an International Representative of the applicant and the Administrator of the applicant's Northern Ontario-Quebec Joint Council (of which Local 579 is one of the eight members) since April of 1973. Prior to that, Mr. Hoffman was a business agent for the applicant. It was his uncontradicted evidence that there have been no negotiations, grievances, or other attempts by the applicant to represent or otherwise exercise bargaining rights on behalf of the employees in that bargaining unit for at least the past twelve years. It was also his uncontradicted evidence that the President Motor Hotel ceased to remit union dues in respect of that unit in the summer of 1971, and that the union has made no attempt to have that remittance restored in the ensuing years. It was further his uncontradicted evidence that the applicant has had no contact with any of the employees in that bargaining unit during that period, with the exception of the contacts during the last six weeks which have given rise to the present certification application.

Having regard to all of the circumstances, we find that the applicant had abandoned its bargaining rights in respect of the aforementioned bargaining unit many years before the present application was made. Thus, the bargaining rights which the applicant had prior to that abandonment are not a bar to the present application. The "automatic renewal" clause in paragraph 2 of the July 21, 1971 Letter of Agreement in no way effects this conclusion, as it is the very bargaining rights which that clause purports to preserve that we have found as a fact to have been abandoned by the applicant in the intervening period (see, generally, *Nordic Hotel*, [1975] OLRB Rep. June 495, at paragraph 16).

5. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
6. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Sudbury, save and except department managers, persons above the rank of department manager, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons for



whom any trade union held bargaining rights as of August 16, 1985, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on August 27, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

8. A certificate will issue to the applicant.

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**1461-84-R** Retail, Wholesale and Department Store Union, Applicant, v. **Sears Canada Inc.**, Respondent, v. Group of Employees, Objectors

**Bargaining Unit - Employee - Appropriate unit found containing office and clerical staff exclusion - Employees in dispute working in service centre as integral part of service centre operations - Whether excluded as office and clerical staff**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *J. A. Ronson* and *L. C. Collins*.

**APPEARANCES:** *Frank Reilly* and *Hugh Buchanan* for the applicant; *N. A. Eber*, *A. E. Patry* and *K. M. Eady* for the respondent; no one for the objectors.

**DECISION OF THE BOARD;** September 18, 1985

1. By decision dated March 1, 1985, the Board, differently constituted, noted that the parties disagreed over whether persons classified as Parts Clerical, Delivery Clerical, Receiving Clerical and Service Clerical should be included in or excluded from the bargaining unit found appropriate by the Board and appointed a Labour Relations Officer "... to inquire into and report back to the Board on the duties and responsibilities of the above named individuals, including their community of interest with the other employees in the bargaining unit or with the office and clerical staff." That bargaining unit description contained an "office and clerical staff" exclusion. The Labour Relations Officer's report was issued on May 17, 1985, and counsel for the respondent filed written submissions and requested a hearing by letter filed with the Board May 24, 1985. The hearing was convened before this panel of the Board on September 9, 1985.

2. The respondent submitted that the persons in dispute ought to be excluded from the bargaining unit as coming within the office and clerical staff exclusion contained in the description of the bargaining unit that was earlier found appropriate for collective bargaining by the Board. The applicant submitted that the employees in dispute were an integral part of

the respondent's service centre and that they shared a community of interest with the other employees in the bargaining unit.

3. The applicant sought certification for the employees employed in the respondent's service centre in Kingston, Ontario. The respondent submitted that the bargaining unit should be comprised of all employees of both its retail store and service centre in Kingston. The Board, differently constituted, by decision dated January 17, 1985, determined that the employees in the service centre location would constitute an appropriate bargaining unit on their own, and thereupon described two bargaining units of employees at the service centre, a full-time unit and a part-time and student unit. In that earlier decision, the Board also determined that office and clerical employees be excluded from the bargaining unit which the respondent submitted was appropriate.

4. The report of the Labour Relations Officer indicates that all of the employees in dispute work in different offices at the respondent's service centre. The Parts Clerical employees, besides performing clerical functions such as maintaining inventory and processing and preparing orders, deal with customers who come to the parts counter in the parts department. Access to the parts department, where the Parts Clerical employees work, is restricted to only those people who work in the department. The only employees in the parts department are Parts Clerical employees and supervision. The Parts Clerical employees also actually handle the parts, stocking shelves and providing parts to service technicians and customers. Their work does not require them to go into the other parts of the service centre which contains repair shops and a warehouse where merchandise is stored and from where deliveries to customers originate.

5. The Service Clerical employees work in the service office. They perform clerical work such as filing, filling out order forms, and preparing service orders. They also deal with customers who come to the service counter to either drop off appliances for repairs or to pick-up their repaired appliances. Both the Parts Clerical and Service Clerical employees also perform telephone work with customers and with the Customer Convenience Centre in the respondent's retail store.

6. The respondent submitted that the Parts Clerical and Service Clerical employees perform many functions similar to the duties of the employees in the Customer Convenience Centre in the respondent's retail store. Indeed, a customer may order parts or leave merchandise for repair at the Customer Convenience Centre. The respondent submitted that the Parts Clerical and Service Clerical employees should be viewed as an extension of the Customer Convenience Centre. Further, the inventory control function of the Parts Clerical employees is similar to the function of the Merchandise Control Office located in the respondent's retail store.

7. The Receiving Clerical employee works in an office and performs clerical work exclusively. The Receiving Clerical employee works closely with the Merchandise Control Office in maintaining accurate inventory information and is in contact with the accounting office of the respondent two or three times a week.

8. The Delivery Clerical employees work in an office doing clerical work related to the delivery of merchandise to customers and handle the drivers' paperwork. They also deal with customers by phone.

9. There have been no transfers between employees that the parties agreed are in the bargaining unit and the classifications in dispute except for three markers who were transferred to the Delivery Clerical position. The respondent has classified the four positions in dispute as clerical. There are no other jobs in the service centre that are in the respondent's clerical classification. The respondent's classification of the positions in dispute is the same as its classification of the positions in the Customer Convenience Centre and the Merchandise Control Office.

10. In the Board's decision in this matter dated January 17, 1985, the Board described the work functions of the Merchandise Control Office and the Customer Convenience Centre in the following way:

"The merchandise control office (mco) is responsible for the unit control of inventory, monitors inventory (and, not unexpectedly, works with department managers and sales staff in this regard) and orders product, as needed, through various mechanisms. The mco is located on the second floor at Princess, down the hall from the customer convenience centre, and shares space with the accounting office.

The customer convenience centre (ccc) handles customer complaints and problems at the counter or by telephone. Staff takes payments on accounts, issues credits to accounts, gives cash refunds, opens customer accounts and cashes cheques for customers. Merchandise to be exchanged may be taken to the relevant merchandise department but is generally returned to the ccc. The ccc also charges for gift wrap service and sells lottery tickets. Customers can order parts through the ccc which maintains a parts catalogue on microfiche."

As noted earlier, the Board determined at paragraph 29 of that decision that the Customer Convenience Centre and Merchandise Control Office employees would have been excluded from the municipal wide bargaining unit that the respondent sought on the basis of the office and clerical exclusion in the unit's description.

11. The Board is of the view that the employees who occupy the positions in dispute are office and clerical staff that are employed in the respondent's service centre. Those employees' work functions are similar, if not identical, to many of the work functions carried out by the Merchandise Control Office and the Customer Convenience Centre. While the employees in question work in the service centre and are an integral part of the service centre's operations, the normal practice of the Board to exclude office and clerical employees from a production bargaining unit is applicable here. (See *H. Gray Limited*, 55 CLLC 18,011, *Wragge Shoes Limited*, [1969] OLRB Rep. Nov. 961; *Bush Gamble Company Ltd.*, [1972] OLRB Rep. June 644.) We do not accept the proposition that these clerical employees have a community of interest with the employees that the parties agree come within the bargaining unit.

12. Therefore, having regard to the Board's determination of March 1, 1985, a final certificate will issue in respect of bargaining unit #2. In view of the the Board's resolution of the dispute between the parties, the Board notes that for purposes of clarity, the term office and clerical staff includes persons classified by the respondent as Parts Clerical, Service Clerical, Receiving Clerical, or Delivery Clerical.



**2342-84-U** The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 27, Complainant, v. **Sparton of Canada Limited**, Respondent

**Duty to Bargain in Good Faith - Unfair Labour Practice - Company making oral offer of two year extension of contract with no change - Subsequently having change of intent re Christmas shut down - Union membership ratifying offer after company had change of intent but before intent communicated to union - Attempt to renege constituting bad faith bargaining although employer acted honestly - Directed to sign as per offer**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *W. H. Wightman* and *K. Rogers*.

**APPEARANCES:** *L. A. MacLean Q.C.*, *Al Seymour* and *J. Flynn* for the complainant; *J. C. Murray*, *W. McNaughton* and *Phillip Day* for the respondent.

**DECISION OF THE BOARD;** September 17, 1985

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the respondent employer has failed to bargain in good faith in contravention of section 15 of the Act. Section 15 provides:

“The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.”

2. The respondent has been involved in a collective bargaining relationship for close to 40 years, first with the National Council of Canadian Labour, and then, since 1979, with the United Automobile Workers and its Local 27, the “complainant” in these proceedings. The issue which ultimately separated the parties in the negotiation of their 1984 - 1985 collective agreement and which continues to separate them in these proceedings, is the length of the “Christmas shutdown”.

3. By way of background, the three collective agreements prior to the one under negotiation were filed with the Board in evidence. The earliest one, the 1977 - 1979 collective agreement with the National Council of Canadian Labour, provides an Article dealing with the Christmas shutdown as follows:

Christmas Shutdown

The Company will have a paid Christmas shutdown as follows:

16-1 In 1977, the Company will shut down from 4:00 p.m. on December 23, 1977 and re-open at 7:30 a.m. on January 2, 1978.

16-2 In 1978, the Company will shut down from 4:00 p.m. on December 22, 1978 and re-open at 7:30 a.m. on January 2, 1979.

The plant is normally shut down on weekends in any event, so that the number of “paid holidays” in a Christmas shut down refers to the number of additional week-days that the plant

remains closed. The above contract language produced an uninterrupted shutdown of five such paid days in 1977, and six in 1978. The Christmas shutdown language in the complainant UAW's first collective agreement following that read as follows:

“Article 17

CHRISTMAS SHUTDOWN

17.01 The Company will have a paid Christmas shutdown as follows:

- (1) In 1982-1983, the Company will shutdown after the last shift on December 21st, 1982, and will reopen for the first shift on January 3rd, 1983.
- (2) In 1982-1984, the Company will shutdown after the last shift on December 20th, 1983, and will reopen for the first shift on January 2nd, 1984.”

That produced paid shutdown periods in the two years of the contract of seven and eight days respectively. Both of those shutdowns began with “Christmas Eve” day and provided an uninterrupted break until either New Year's Day or the day after.

4. The succeeding collective agreement was negotiated only after a lengthy strike, and one of the items resolving the strike was an agreement that the Christmas shutdown be fixed at *eight* paid days, irrespective of the number of days required to bridge the gap from Christmas Eve to New Year's. When the strike was over, the union negotiator, Al Seymour, and the company negotiator, Ken Holland, sat down and worked out the actual schedule for the shutdown, which found its way into the following collective agreement language:

Article 17

CHRISTMAS SHUTDOWN

17.01 The Company will have a paid Christmas shutdown as follows:

- (1) In 1979-1980, the Company will shut down after the last shift on December 21st, 1979, and will reopen for the first shift on January 2nd, 1980.
- (2) In the 1980-1981, the Company will shut down after the last shift on December 23rd, 1980, and will reopen for the first shift on January 5th, 1981.

Once again the break was continuous.

5. In the current set of negotiations, the Union in its written contract demands simply provided on this issue:

“Article 17

CHRISTMAS SHUTDOWN

Work out schedule with the continuation of Christmas shutdown.”

At the opening meeting between the parties in January of 1984 the Union explained this to be a requirement of eight days, as had been agreed in the previous contract. Mr. Holland, the

manager of labour relations, was present at these negotiations for the company, together with outside labour counsel acting as spokesperson. At the conclusion of the Union's review of its demands, Ms. Laing, the spokesperson, indicated that the company would consider the union's proposals and respond at the next meeting. That meeting took place toward the end of January, and at it Ms. Laing indicated that there was no sense "beating around the bush", and that it was the company's position, in view of its non-competitive financial situation, that the expiring collective agreement ought to be renewed for a period of two years without changes. Mr. Seymour, once again the spokesperson for the union, asked whether the company was likely to close down the plant (which was in London) and transfer the work to its (non-union) plant in Campbellford, Ontario. Mr. Holland responded on behalf of the company, that that was not the company's present thinking, and that acceptance by the union of the company's position would help to ensure that that did not happen. The company's position was, however, flatly rejected by the Union, and brought an end to the talks at that point. As the union had already applied for conciliation, a "no-board" report issued on February 3rd. The parties were, accordingly, in a lawful strike position by the end of February of 1984. The Union, however, assessed its bargaining position, and, on the basis of the reduced numbers already employed in the London plant, decided it was not in the interests of any party to attempt to mount a strike. When the parties met again on April 16th, with a mediator, therefore, the deadline for strike action had long since passed.

6. By the time of that meeting, new labour counsel, Mr. McNaughton, had replaced Ms. Laing as company spokesperson, although Mr. Holland continued to bear the responsibility for the handling of negotiations, and instructing counsel with respect thereto. Once again the company's position was put forward, by Mr. McNaughton this time, on the basis of "two years, no change", subject to whatever modifications the language required according to the new dates of the contract. Once again this meeting was brief, but Mr. Seymour did turn to Mr. Holland at the table, and asked him what the company's proposal meant in terms of the Christmas shutdown. Mr. Holland testified that he was surprised by Mr. Seymour's question, because he viewed it as somewhat rhetorical, but that he responded to Mr. Seymour with the words: "no change". Mr. Holland further testified that his answer was based on the assumption that the Christmas shutdown would provide for eight paid days, as had been negotiated last time around, and that the parties would, once again, simply sit down after an agreement was reached to settle upon the dates from the calendar. As it happens, however, Mr. Holland left the employ of the company three days after that meeting.

7. Mr. Holland was replaced as Manager of Labour Relations for the London plant by Mr. Philip Day, who had joined the company in January of that year as Labour Relations Manager for the Campbellford plant. The extent of Mr. Day's familiarity with the history of negotiations for the plant, both as to prior and current rounds of bargaining, was, obviously, far more limited than Mr. Hollands'. As the summer marched on, without any sign of further negotiations on the horizon, the company began receiving inquiries from employees wishing to plan their holidays for the Christmas period, and Mr. Day began to turn his mind to the arrangement of an appropriate shutdown schedule. In doing so, Mr. Day looked at the company's Paid Holiday Policy for Salaried, Non-Bargaining Unit Employees, together with the bargaining-unit employees' entitlement under the expired collective agreement which the company had continued to honour. The salaried policy provided for five paid holidays at Christmas - New Year's time, being Christmas Day, Boxing Day, New Year's Day and, as well, New Year's Eve Day and Christmas Eve Day (the latter likely explaining why the Christmas shutdown in recent years had always commenced not later than Christmas Eve Day,



December 24). Article 16 of the collective agreement, on the other hand, only provided for three paid holidays at this time of the year, being Christmas Day, Boxing Day and New Year's Day. Mr. Day was aware that, pursuant to the next article of the collective agreement, "Article 17 - Christmas Shutdown", the plant in the preceding year had shut down for eight consecutive paid week-day holidays, but considered this to be too rich for the company's present economic circumstances. He therefore made a recommendation to his superiors that the bargaining-unit employees receive for that year only their specific (3) paid holidays under Article 16 of the expired agreement, with the plant to operate as normal on the other work-days in and around that period. The salaried staff would receive the five days off with pay in accordance with the company's policy. Mr. Day's evidence is that the collective-bargaining situation, having been moribund for several months at that point, was not a factor that he considered at all, and the Board accepts his evidence in that regard. He was, however, aware that there were certain statutory "freeze" provisions in the *Labour Relations Act*, and telephoned Mr. McNaughton to indicate what he had in mind with respect to the "shutdown", and to ask Mr. McNaughton whether he foresaw any difficulties. Mr. Day cannot recall what Mr. McNaughton's response was. These discussions, according to Mr. Day, took place at the time he was issuing a memorandum on the subject to his superiors, being September 10th, 1984.

8. The next development on the collective-bargaining front was a phone call from Mr. Seymour to Mr. McNaughton, asking about a notice which employees reported to him had been posted by the company on its bulletin board. That notice indicated that the company at that point was waiting for a response from the Union, and Mr. Seymour asked Mr. McNaughton whether the notice meant that there had been some change in the company's earlier bargaining position. Mr. McNaughton advised Mr. Seymour that as far as he was aware, there had not been any change, but that he would check with the company and call Mr. Seymour back. On September 24th Mr. McNaughton did call Mr. Seymour back, and confirmed that there had been no change in the company's position. Mr. McNaughton testified that he was able to recall Mr. Seymour's precise response only because it was so short, being simply: "Okay - 'bye'". Mr. McNaughton went on to add that that reply stuck in his mind because Mr. Seymour was not normally as brief as that, nor as polite. Mr. Seymour, on the other hand, testified that he responded to Mr. McNaughton: "Okay - we'll take it to the membership and see what they think". The Board has no reason to doubt the sincerity of Mr. Seymour's evidence, and we have no difficulty accepting that his *intention* was to take the company's proposal back to the membership when he hung up the phone from Mr. McNaughton. The evidence of Mr. McNaughton was clear and unequivocal, however, that prior to October 4, 1984, he had no knowledge of the Union's offer before the membership. Had it been otherwise, we think it would have been far more likely, as Mr. McNaughton suggests, that, in light of so significant a development, Mr. McNaughton would have immediately raised the matter with the company, to permit them a final opportunity to review their bargaining position, or at least to make them aware of the Union's intentions. Rather, the company at that point appears to have continued in the belief that negotiations were wholly in abeyance, and certainly they did not proceed with any particular haste to announce to employees the plans that they had in mind for the Christmas shutdown.

9. Those plans did, however, come to be settled between Mr. Day and his superiors during the final week of September. In light of the inefficiency which would arise from Mr. Day's recommendation of having the plant operate for two of the days in the Christmas period when there would be no supervisory or support staff at work, it was decided to give

the bargaining unit a five day paid Christmas shutdown for 1984-1985, and six days for 1985-1986. That meant, in 1984, for example, that the plant would operate on December 27th and 28th. Mr. Day then prepared a memorandum to the employees to this effect, dated October 1, 1985, and sent it to London with instructions to distribute it to the union's Plant Committee, and thereafter to post it in the plant. The meeting with the Plant Committee was initially to be arranged for October 3rd, but owing to the unavailability of certain individuals, was pushed back to the morning of October 4.

10. Ironically, it was that one-day delay which has led to the present proceedings. Unknown to the company, the union held a membership meeting on the night of October 3rd, in order to vote on the two-year renewal proposal of the company. Neither Mr. Seymour nor the bargaining committee made any recommendation, other than for Mr. Seymour to indicate that this appeared to be as good a proposal as they were likely to get. There was obviously not much in that proposal for employees to be excited about, and an employee on the floor asked Mr. Seymour if the previous agreement's Christmas shutdown of eight days was still there. Mr. Seymour, on the strength of Mr. Holland's April assurance, responded that it was. When the vote was taken, the majority elected in favour of accepting the company's offer of a two-year contract with no changes. The bargaining committee itself was shocked and dismayed, and promptly resigned over the result.

11. The Chairman of the bargaining committee and another committee member were both members of the Union's regular Plant Committee, and the evidence of Mr. Seymour reflects his understanding that the meeting between the company and the Plant Committee the next morning was a stormy one: the bargaining committee members present being already upset over the events of the night before, and the company tabling a copy of Mr. Day's Christmas shutdown notice. Mr. Seymour, in the meantime, had been trying to reach Mr. McNaughton to advise him of the employee's acceptance of the company's offer. Mr. McNaughton called Mr. Seymour back around noon that day, and received news of the Union's acceptance. Mr. McNaughton responded "Fine", and indicated that they would have to get together and iron out the details. They discussed the fact that October 3rd was the actual date of ratification, being the date from the which the parties in the past had always made their renewal agreements effective. Mr. Seymour testified that, as Christmas was approaching, he thought he had better give Mr. McNaughton immediately the dates that the Union had in mind for the Christmas shutdown (being eight in all). Mr. McNaughton had already spoken to Mr. Day earlier that morning in an effort to find out why Mr. Seymour might be calling. Mr. Day, thinking that his shutdown Notice had already been communicated to the Plant Committee the day before as he had directed, apparently assumed that that was the problem, and advised Mr. McNaughton of the dates for shutdown that the company had set. Mr. McNaughton was therefore able to respond to Mr. Seymour that the dates he had listed were not the dates that the company had in mind for the shutdown. Mr. McNaughton stated that he would confirm the dates with the company and call Mr. Seymour back, which he did. Mr. Seymour indicated that the company's dates were not acceptable (being five paid days in all), and Mr. McNaughton indicated that the union's proposed dates were not acceptable. The two parties exchanged a considerable number of telephone calls and correspondence over that, but ultimately agreed to meet with the mediator on November 14th to attempt to iron out their differences. Mr. McNaughton acknowledged in his evidence that the only matter of dispute between himself and Mr. Seymour during this series of communications was the question of the dates for the Christmas shutdown. The Union, through Mr. Seymour, was in fact taking the position at this point that the parties had a collective agreement, the offer of the company

having been accepted by the employees at the meeting of October 3rd. Mr. Seymour testified that he suggested that the parties' meeting take place with the mediator because the mediator had been present at the April 16th meeting when the question of the Christmas shutdown was specifically discussed.

12. At the November 14th meeting, Mr. McNaughton and Mr. Day were made aware for the first time that Mr. Day's notice concerning the shutdown did not in fact find its way into the hands of the Committee until October 4th. This revelation, however, had no effect on the position the company was taking, i.e. that it had never agreed to any specific number of days for the forthcoming Christmas shutdown, and that it was open to it to establish those days as it had. The meeting ended with the Union still saying that the company had committed itself to eight days, and that the parties now had a collective agreement, and the company denying that that was the case. The Christmas shutdown proceeded in accordance with the October 1st Notice, and the Union launched these proceedings.

13. As the above recitation indicates, the Union never did receive anything in writing from the company with respect to its proposal, and the Union does not take the position that it now has a "collective agreement" with the company, as defined by the *Labour Relations Act*. Rather, the Union argues that all ingredients of a "deal" had been resolved between the parties when the offer of the company was accepted on October 3rd, 1984, and that the company's attempt to renege on the offer, which included an eight-day uninterrupted Christmas shutdown, upon notification of the Union's acceptance, amounted to bargaining in bad faith. The Union relies on *Pipe Line Contractors' Association et al*, 82 CLLC 16,142, for the application of standard principles of contract to collective bargaining. The complainant Union requests the Board, therefore, to direct the company to enter into a collective agreement with the complainant in the terms agreed upon. The complainant pointed to a number of cases, including *Fotomat Canada Limited*, [1981] OLRB Rep. Feb. 145; *Treco Machine and Tool*, [1982] OLRB Rep. Dec. 1954; *Corporation of the City of Thunder Bay*, [1983] OLRB Rep. Oct. 1722; *Northwest Merchants* 4 CLRBR 358, as authority for the Board to direct the execution of a collective agreement when all ingredients necessary thereto have been agreed upon. The respondent argues that there never in fact was any "change" in the company's position and that in any event the earlier offer had lapsed by the time that the union purported to accept it. The respondent's primary argument, however, is that even if the company did change its position, a finding of "bad faith" bargaining is manifestly a question of *motive*, and the respondent cites in support thereof the comments of the Board in *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397 at p. 1423. In the absence of *mala fides*, the respondent submits, there is nothing to prevent an innocent change of mind. The respondent also submits that all ingredients to the finalizing of a collective agreement had *not* been agreed to, the question of the commencement date of the two-year "renewal" agreement never having been discussed, as well as the specific dates for the Christmas shutdown never having been determined. The respondent argues that the complainant is in effect asking the Board to "make the deal the parties didn't make".

14. Unlike some of the cases cited to us, we are satisfied here that there was no intention on the part of the respondent to avoid the signing of any collective agreement. The Union's decision to take the company's position to the membership, and the company's determination of a Christmas "shutdown" schedule, were each taking shape independently of one another, with the course of action of neither party being known to the other. We are satisfied that it was pure coincidence that both of those courses of action culminated, in terms of



communication to the other side, on one and the same day, although it is not difficult to see in such circumstances why each party became suspicious of the other's apparently sudden reversal. The case must be analyzed, therefore, on the basis of the respondent having acted as it did *without* the specific intent of scuttling the negotiations.

15. It is not unusual for two parties in negotiations, including in the context of collective bargaining, to both be acting in "good faith" in entering into a contract, yet for both to have a different understanding of what the language of their "bargain" was to mean. Where that bargain is reduced to writing and appropriately ratified, a "collective agreement" results, and the determination of what its terms are to mean for the parties is made objectively through the process of grievance arbitration.

16. The unusual feature of this case is the testimony of Mr. Holland. While Mr. Holland had left the company by the time his evidence was given, and appeared as a witness under summons by the Union, his evidence was given credibly, and was not challenged, even on cross-examination, by the respondent. Mr. Holland's testimony establishes unequivocally that the interpretation of the company's proposal of April 16th was, on *both* sides of the table, the same. That is, "two years - no change" with respect to the only matter now in dispute, the Christmas shutdown, meant the same number of paid days (8) as had been bargained for in the preceding round of negotiations, the exact determination of which being simply a matter of sitting down *after* settlement and drawing the dates off the calendar. The complainant did not, however, accept the company's proposal on April 16th, and it clearly was, as Mr. Murray argues, open to either party to change their position, for good-faith reasons, at any time prior to an agreement being reached. See, e.g. *Cybermedix*, [1981] OLRB Rep. Jan. 13. The problem for the respondent, however, is that it did not do that.

17. While the injection on the company's behalf of new personnel responsible for the bargaining led, in effect, to a change of *intent* on the company's part, that change of intent was, prior to October 4th, never made known to the *Union*. On the contrary, and in response to Mr. Murray's argument of "lapse", the respondent through Mr. McNaughton specifically confirmed on September 24th that there was no change in the company's position of April. And that, once again, from both sides of the table, meant eight paid holidays in the shutdown. The Union then, on the strength of that statement, altered its position in bargaining and put that proposal to the membership, subsequently confirming acceptance of the same to the respondent. Having thus led the Union to alter its position in bargaining, albeit without ill intent, it is our view that the respondent cannot now be permitted to renege on the position which it had placed on the table. To hold otherwise, it seems to us, would introduce so fundamental an element of mischief into the collective-bargaining process, from the point of view of *either* side of the table, as to undermine the integrity of the process itself. This is true notwithstanding the relative bargaining strengths of the parties in any particular set of negotiations.

18. The Board accordingly finds that the respondent has acted in violation of section 15 of the *Labour Relations Act* in purporting to modify its offer for a collective agreement after permitting the complainant to accept it. The respondent is thus directed by the Board to enter into a collective agreement with the complainant, effective, as in the past, from the date of the membership's acceptance (October 3, 1984), on the basis of the company's oral offer of "two years - no change". As this decision has clarified, that offer includes an uninterrupted Christmas shutdown of eight paid holidays.

19. That will accordingly be the form of the Christmas shutdown in 1985-86, the second year of the contract. As the 1984-85 year has already passed, however, and a Christmas shutdown of only five paid holidays observed, we direct the respondent to provide each of the employees in the bargaining unit who was also employed as of December 27, 1984, with 3 additional working-days off with pay at a time to be scheduled by the respondent, but not later than December 23, 1985.

20. In light of our conclusion that the respondent acted honestly, although erroneously, in this matter, we are not of the view that any additional form of relief requested by the complainant, including what has been termed a *Swan Tours* form of damages, are appropriate.

21. The Board will remain seized of this matter in the event any dispute exists over the implementation of the order which the Board has made.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1985

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**1956-83-R:**The Canadian Union of Public Employees, (Applicant) v. The Hospital for Sick Children, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the Hospital for Sick Children in the Municipality of Metropolitan Toronto, save and except professional medical staff, Graduate and Undergraduate Nurses, Graduate and Undergraduate Pharmacists, Graduate Dietitians, Student Dietitians, Social Workers, Child Care Workers, Play Park Attendants, Recreationists, persons engaged in research work, technical personnel, Supervisors, persons above the rank of Supervisor, Foremen, persons above the rank of Foreman, Chief Engineer, Office and Clerical Staff, Security Guards, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (1161 employees in unit). (*Clarity Note*).

**0190-84-R:**Christian Labour Association of Canada, (Applicant) v. Jen-Ry Utility Contracting Company Limited, Pemrow Pipelines Construction Company Limited and R.F. Wilson Limited, (Respondents) v. International Union of Operating Engineers, Local 793, (Intervener #1) v. Labourers' International Union of North America, Local 183, (Intervener #2).

Unit: "all construction industry employees of Jen-Ry Utility Contracting Company Ltd. save and except non-working foremen and persons above the rank of non-working foreman, employed in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham." (4 employees in unit).

**2591-84-R:**Ontario Public Service Employees Union, (Applicant) v. Elizabeth Fry Society of Ottawa, (Respondent).

Unit #1: "all employees of the respondent in Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period and persons employed pursuant to the Ontario Youth Corps Programme." (8 employees in unit).

Unit #2: "all employees of the respondent in Ottawa regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons employed pursuant to the Ontario Youth Corps Programme." (6 employees in unit).

**0055-85-R:** United Food and Commercial Workers International Union, Local 175, (Applicant) v. The Corporation of the Town of Dunnville, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Dunnville save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of April 9, 1985, being the application date." (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office employees of the respondent at Dunnville, save and except deputy clerk and deputy treasurer, persons above the rank of deputy clerk and deputy treasurer, secretary to the Mayor, receptionist-typist, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

**0349-85-R:** London and District Service Workers' Union, Local 220 - Service Employees International Union, American Federation of Labour, Canadian Industrial Organization, Canadian Labour Congress, (Applicant) v. Kitchener-Waterloo YWCA, (Respondent).

Unit #1: "all employees of the respondent in Kitchener, save and except Unit Directors, persons above the rank of Unit Director, Administrative Assistant, Recreational Co-ordinator, Volunteer Co-ordinator, Program Co-ordinator, Life Skills Co-ordinator, Bookkeeper, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

**0451-85-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. D.G.M. - Dominion General Manufacturing Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, quality control manager and office and sales staff." (76 employees in unit).

**0495-85-R:** United Steelworkers of America, (Applicant) v. International Paints (Canada) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and technical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, sales staff, secretary to the general manager, all employees engaged in the research and development department and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*).



**0517-85-R:**Amalgamated Clothing and Textile Workers Union - Toronto Joint Board, (Applicant) v. Ports International Limited and Tabi International Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondents in the Municipality of Metropolitan Toronto, save and except foreperson and persons above the rank of foreperson, employees in the respondents' retail outlets, office, clerical, technical, design and sales employees, persons regularly employed during the school vacation period." (32 employees in unit). (*Having regard to the agreement of the parties*).

**0672-85-R:**United Brotherhood of Carpenters & Joiners of America Local 494, (Applicant) v. F.W. Sawatzky Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**0730-85-R:**United Steelworkers of America, (Applicant) v. Canadian Textiles Screen Prints Limited, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (27 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0748-85-R:**United Steelworkers of America, (Applicant) v. The Ontario Society for the Prevention of Cruelty to Animals operating as the Ontario Humane Society, (Respondent).

Unit: "all employees working in and out of the respondent's premises in the City of Sudbury, save and except supervisors and persons above the rank of supervisor." (9 employees in unit). (*Having regard to the agreement of the parties*).

**0755-85-R:**Service Employees Union, Local 478, (Applicant) v. Anson General Hospital, (Respondent).

Unit: "all employees of the respondent in Iroquois Falls, Ontario, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, supervisors, persons above the rank of supervisor, office staff and employees in bargaining units for which any trade union held bargaining rights on June 28, 1985." (30 employees in unit). (*Clarity Note*).

**0759-85-R:**Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Lake Simcoe Enterprises Limited, (Respondent).

Unit: "all students employed during the school vacation period by the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and employees in bargaining units for which any trade union held bargaining rights as of June 27, 1985, being the date of application." (15 employees in unit). (*Having regard to the agreement of the parties*).

**0763-85-R:** Hotel Employees, Restaurant Employees Union, Local 75, (Applicant) v. Ed Mirvish Enterprises Limited c.o.b. as Ed's Chinese Restaurant, Ed's Italian Restaurant, Ed's Seafood Restaurant, Ed's Warehouse Restaurant, Old Ed's and Ed's Folly, (Respondents).

Unit: "all employees of the respondent at Ed's Chinese Restaurant, Ed's Italian Restaurant, Ed's Seafood Restaurant, Ed's Warehouse Restaurant, Old Ed's, and Ed's Folly in Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, those above the rank of supervisor, head chefs, sous chefs, head bartenders, maitre d's, security staff, artists, parking attendants, office, clerical and sales staff." (16 employees in unit). (*Having regard to the agreement of the parties*).

**0764-85-R:** Hotel Employees, Restaurant Employees Union, Local 75, (Applicant) v. Ed Mirvish Enterprises Limited c.o.b. as Ed's Chinese Restaurant, Ed's Italian Restaurant, Ed's Seafood Restaurant, Ed's Warehouse Restaurant, Old Ed's, and Ed's Folly, (Respondents).

Unit: "all employees of the respondent at Ed's Chinese Restaurant, Ed's Italian Restaurant, Ed's Seafood Restaurant, Ed's Warehouse Restaurant, Old Ed's, and Ed's Folly in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, head chefs, sous chefs, head bartenders, maitre d's, security staff, artists, parking attendants, office, clerical and sales staff, students employed during the school vacation period and persons employed for not more than 24 hours per week." (347 employees in unit). (*Having regard to the agreement of the parties*).

**0816-85-R:** United Steelworkers of America, (Applicant) v. Amari Metals Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Markham, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

**0837-85-R:** Ontario Public Service Employees Union, (Applicant) v. Alan R. Barker Ambulance Service, (Respondent).

Unit #1: "all employees of the respondent in the Township of Richmond and the Town of Carleton Place, save and except owner-operators and managers, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in the Township of Richmond and the Town of Carleton Place, save and except owner-operators and managers

and persons above the rank of manager.”(9 employees in unit).(*Having regard to the agreement of the parties*).

**0838-85-R:**International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. R & D Friction Inc., (Respondent).

Unit:“all employees of the respondent in Milton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.”(21 employees in unit).(*Having regard to the agreement of the parties*).

**0842-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Harnden & King Construction (Ontario) Limited, (Respondent).

Unit:“all employees of the respondent working at or out of the Keyes Pit in the Township of Murray in the County of Northumberland, save and except non-working foremen and those above the rank of non-working foreman.”(3 employees in unit).(*Having regard to the agreement of the parties*).

**0854-85-R:**Office & Professional Employees International Union, (Applicant) v. Community Travel Services Ltd., c.o.b. as La-To World Travel Agency, (Respondent).

Unit:“all employees of the respondent in the towns of Kapuskasing and Hearst, save and except manager, persons above the rank of manager, bookkeeper, and persons regularly employed for not more than twenty-four (24) hours per week.”(6 employees in unit).(*Having regard to the agreement of the parties*).

**0859-85-R:**Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, (Applicant) v. E.J. Daniel Holdings Inc., (Respondent).

Unit:“all employees of the respondent at its Steak and Burger Restaurant at 1800 Sheppard Avenue East, Toronto, save and except hostesses, persons above the rank of hostess, office staff and students employed during the school vacation period.”(25 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

**0862-85-R:**Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Westburne Industrial Enterprises Limited, (Respondent) v. Group of Employees, (Objectors).

Unit:“all employees of the respondent’s Nedco Division in Mississauga, Ontario, save and except supervisors, those above the rank of supervisor, clerical, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.”(47 employees in unit).(*Having regard to the agreement of the parties*).

**0864-85-R:**Ontario Public Service Employees Union, (Applicant) v. MacMillan House, (Respondent).

Unit:“all employees of the respondent at Barrie, Ontario, save and except Program Director, Office Manager and persons above the rank of Office Manager.”(9 employees in unit).(*Having regard to the agreement of the parties*).



**0872-85-R:**International Woodworkers of America, (Applicant) v. Jayden Inc., (Respondent).

Unit: "all employees of the respondent in Hyde Park, Ontario, save and except Department Heads, persons above the rank of Department Head, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (42 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0873-85-R:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. DAF Plastics Limited, (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (16 employees in unit).

**0875-85-R:**Ontario Public Service Employees Union, (Applicant) v. The Corporation of the Town of Gravenhurst, (Respondent).

Unit: "all employees of the respondent in the Town of Gravenhurst, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights on July 9, 1985 being the date of application." (4 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**0891-85-R:**Amalgamated Clothing and Textile Workers Union - Toronto Joint Board, (Applicant) v. Imperial Feather Corporation (Toronto) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, designers, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (166 employees in unit). (*Having regard to the agreement of the parties*).

**0900-85-R:**Canadian Paperworkers Union, (Applicant) v. W.H. Smith Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at its head office in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, buyers, sales staff, secretary to the president, secretary to the vice-president finance, secretary to the vice-president planning and development, secretary to the vice-president marketing, secretary to the vice-president retail, secretary to the vice-president and corporate secretary, programmer, display and promotions co-ordinator, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and students employed on a co-operative program with a school, college or university." (56 employees in unit). (*Having regard to the agreement of the parties*).

**0901-85-R:**International Union United Plant Guard Workers of America Amalgamated Local 1962, (Applicant) v. University of Toronto, (Respondent).

Unit: "all security officers and security guards of the respondent in the Municipality of Metropolitan Toronto and the City of Mississauga employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except sergeants and persons above the rank of sergeant." (2 employees in unit). (*Having regard to the agreement of the parties*).

**0922-85-R:** Ontario Public Service Employees Union, (Applicant) v. Almaguin Highlands Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent in the District of Parry Sound, save and except the Executive Director." (9 employees in unit).

**0932-85-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Ruggedair Systems Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**0933-85-R:** International Association of Machinists & Aerospace Workers, (Applicant) v. Angama Industries Incorporated, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Port Hope, save and except supervisors/foremen, persons above the rank of supervisor/foreman and office and sales staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

**0939-85-R:** United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. 569210 Ontario Limited c.o.b. as City Farms, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except department heads, persons above the rank of department head and persons regularly employed for not more than twenty-four (24) hours per week." (32 employees in unit). (*Clarity Note*).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto who are regularly employed for not more than twenty-four (24) hours per week save and except department heads and persons above the rank of department head." (29 employees in unit). (*Clarity Note*).

**0940-85-R:** Ontario Nurses' Association, (Applicant) v. Good Samaritan Nursing Home, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Alliston, Ontario, save and except the director of nursing and persons above the rank of director of nursing." (6 employees in unit). (*Having regard to the agreement of the parties*).

**0942-85-R:**Hotel Employees, Restaurant Employees Union Local 75, (Applicant) v. CP Airlines Limited, (Respondent).

Unit: "all employees of the respondent at the Red Oak Inn, Windsor, employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and accounting staff and persons for whom any trade union held bargaining rights on the 12th day of July, 1985." (15 employees in unit). (*Having regard to the agreement of the parties*).

**0945-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. P.R. Zepieri Excavating & Grading Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0964-85-R:**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508, (Applicant) v. Burns Steelfab Services, (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices, pipewelders, pipewelders' apprentices, pipefitters, pipefitters' apprentices and gasfitters and gasfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices, pipewelders, pipewelders' apprentices, pipefitters, pipefitters' apprentices and gasfitters and gasfitters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**0967-85-R:**Graphic Communications International Union, Local 500M, (Applicant) v. Offset Printing & Litho, A Division of Southern Printing Limited (Specialty Department), (Respondent).

Unit: "all employees of the respondent in Markham, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and



employees in bargaining units for which any trade union held bargaining rights as of July 16, 1985 being the date of application.”(24 employees in unit).(*Having regard to the agreement of the parties*).

**0968-85-R:**Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. H & E Plating (Canada) Ltd., (Respondent).

Unit:“all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.”(19 employees in unit).(*Having regard to the agreement of the parties*).

**0971-85-R:**United Steelworkers of America, (Applicant) v. Borealis Yachts Inc., (Respondent).

Unit:“all employees of the respondent in the City of Hamilton, save and except production manager, persons above the rank of production manager, office and sales staff.”(10 employees in unit).(*Having regard to the agreement of the parties*).

**0973-85-R:**Canadian Union of Public Employees, (Applicant) v. Hester How Day Care Centre, (Respondent).

Unit:“all employees of the respondent in Metropolitan Toronto, save and except assistant supervisor and persons above the rank of assistant supervisor.”(6 employees in unit).(*Having regard to the agreement of the parties*).

**0981-85-R:**United Food and Commercial Workers International Union, Local 175, AFL, CIO, CLC, (Applicant) v. Dunnville Hydro-Electric Commission, (Respondent).

Unit:“all employees of the respondent in Dunnville, Ontario, save and except foremen and persons above the rank of foreman.”(9 employees in unit).(*Having regard to the agreement of the parties*).

**0988-85-R:**Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. O.J. Pipelines, a division of Ocelot Investments Ltd., (Respondent).

Unit #1:“all truck drivers and warehouse personnel in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.”(20 employees in unit).

Unit #2:“all truck drivers and warehouse personnel in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.”(20 employees in unit).

**0996-85-R:**United Steelworkers of America, (Applicant) v. Upwardor Corp. and Upward Garage Doors Limited, (Respondents) v. Group of Employees, (Objectors).

Unit: "all employees of the respondents in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, technical and sales staff and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*). (Clarity Note).

**0997-85-R:** Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL-CIO-CLC, (Applicant) v. Charlotte Eleanor Englehart Hospital, (Respondent).

Unit #1: "all office and clerical employees of the respondent in Petrolia, save and except supervisors, persons above the rank of supervisor, Senior Clerk - Payroll Personnel, Director of Nursing - Secretary, Administrator's Secretary, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of July 18, 1985, being the date of application." (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office and clerical employees of the respondent in Petrolia regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, Senior Clerk - Payroll Personnel, Director of Nursing - Secretary, Administrator's Secretary and employees in bargaining units for which any trade union held bargaining rights as of July 18, 1985, being the date of application." (6 employees in unit). (*Having regard to the agreement of the parties*).

**1007-85-R:** Ontario Nurses' Association, (Applicant) v. Board of Health for the Kent-Chatham Health Unit, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent, regularly employed for not more than twenty-four (24) hours per week, save and except supervisors - Public Health Nurse, persons above the rank of supervisor - Public Health Nurse, and the Administrator - Home Care Program." (5 employees in unit). (*Having regard to the agreement of the parties*).

**1011-85-R:** Ontario Public Service Employees Union, (Applicant) v. Nipissing College, (Respondent).

Unit: "all office, clerical and technical employees of the respondent in the City of North Bay regularly employed for not more than 24 hours per week, and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretary to the President, secretary to the Director of Administration and the Personnel officer, and employees for which a trade union held bargaining rights as of July 22, 1985." (5 employees in unit). (*Having regard to the agreement of the parties*). (Clarity Note).

**1043-85-R:** United Steelworkers of America, (Applicant) v. Canadian Foundry Supplies Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, technical and sales staff and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

**1044-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. R.J. Bender Construction Ltd., (Respondent).

Unit #1:“all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(4 employees in unit).

Unit #2:“all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.”(4 employees in unit).

**1045-85-R:**Ontario Public Service Employees Union, (Applicant) v. Chatham-Kent Community and Family Services, (Respondent).

Unit:“all employees of the respondent working at or out of Blenheim, save and except supervisors, and persons above the rank of supervisor.”(31 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

**1056-85-R:**Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Lambton, (Respondent).

Unit:“all office, clerical and technical employees of the respondent in the County Administration Building at Wyoming regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, county engineer, senior finance officer, senior payroll clerk and secretary to the county clerk.”(8 employees in unit).(*Having regard to the agreement of the parties*).

**1057-85-R:**Labourers’ International Union of North America, Local 493, (Applicant) v. Rowad Pipeline Company Ltd., (Respondent).

Unit #1:“all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.”(12 employees in unit).

Unit #2:“all construction labourers in the employ of the respondent within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.”(12 employees in unit).

**1074-85-R:**United Steelworkers of America, (Applicant) v. Turner & Seymour of Canada Ltd., (Respondent).

Unit:“all employees of the respondent in the Town of Lindsay, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for



not more than twenty-four hours per week and students employed during the school vacation period.”(23 employees in unit).(*Having regard to the agreement of the parties*).

**1083-85-R:**Retail, Wholesale and Department Store Union, (Applicant) v. Educator Supplies Limited, carrying on business as Educator Supplies and Scholar’s Choice, (Respondent).

Unit:“all employees of the respondent regularly employed for not more than 24 hours per week and students employed during school vacation period at its retail stores in London, Ontario, save and except office manager, persons above the rank of office manager, distribution manager, advertising manager, purchasing manager, accounting manager, store manager, store supervisor, store manager trainees, contracts manager, office, clerical and outside sales staff, employees working in the Edcom Multimedia Products Division, and employees in bargaining units for which any trade union held bargaining rights as of July 29, 1985.”(3 employees in unit).(*Having regard to the agreement of the parties*).(*Clarity Note*).

**1084-85-R:**United Plant Guard Workers of America, Local 1958, (Applicant) v. The Art Gallery of Windsor, (Respondent).

Unit:“all security guards regularly employed by the respondent at Windsor for not more than 24 hours per week and students employed during the school vacation period.”(2 employees in unit).(*Having regard to the agreement of the parties*).

**1085-85-R:**United Food & Commercial Workers International Union, (Applicant) v. Perth Community Care Centre, (Respondent) v. A Group of Employees, (Objectors).

Unit #1:“all employees of the respondent in Perth, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, security guards, office and clerical staff, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation.”(37 employees in unit).(*Having regard to the agreement of the parties*).

Unit #2:“all employees of the respondent in Perth, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, security guards, office and clerical staff.”(11 employees in unit).(*Having regard to the agreement of the parties*).

**1104-85-R:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. United Co-operatives of Ontario, (Respondent).

Unit:“all employees of the respondent at Kingsville, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.”(6 employees in unit).(*Having regard to the agreement of the parties*).

**1134-85-R:**The United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Nick De Luca Plumbing Ltd., (Respondent).

Unit #1:“all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.”(3 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

**1143-85-R:** Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88 (AFL-CIO-CLC), (Applicant) v. 573852 Ontario Inc. c.o.b. as O'Toole's Road House Restaurant, (Respondent) v. Joe Duarte, (Objector).

Unit #1: "all employees of the respondent at Oshawa, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, students employed during the school vacation period, and persons regularly employed for not more than 24 hours per week." (18 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Oshawa, Ontario, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office staff, and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

**1157-85-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Mohawk Metal Products Limited, (Respondent).

Unit: "all employees of the respondent in Windsor, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

**1159-85-R:** Hotel Employees, Restaurant Employees Union, Local 75, (Applicant) v. MSL Properties Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at the Roehampton Hotel, 808 Mount Pleasant Road, Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (43 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

**1166-85-R:** Labourers' International Union of North America, Local 527, (Applicant) v. Symetrie Industries Inc., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

### Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

**0691-85-R:**International Union of Operating Engineers, Local 796, (Applicant) v. Université d'Ottawa/University of Ottawa, (Respondent) v. Graphic Communications International Union, Local 588, (Intervener).

Unit: "all the production employees employed in Reprographic Services (K category) in Ottawa, save and except Supervisors, Foremen, persons above the rank of Supervisor and Foreman, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods." (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	28
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	13
Number of ballots marked in favour of intervener	5

### Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**3304-84-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Attica Investment Inc. T/A Fairbank Carpentry and E. & R. Carpentry Inc., (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of Attica Investment Inc. T/A Fairbank Carpentry and E. & R. Carpentry Inc. engaged in residential construction in the Province of Ontario, exclusive of the Counties of Essex and Kent; the area within a radius of 81 kilometres of the Timmins Federal Building; the Town of Kirkland Lake and the geographic Townships adjacent thereof in the District of Temiskaming; that portion of the District of Algoma south of the 49th parallel of latitude; the Districts of Thunder Bay, Rainy River and Kenora (including the Patricia portion) and that portion of the District of Cochrane north of the 50th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	1

**0349-85-R:**London and District Service Workers' Union, Local 220 - Service Employees International Union, American Federation of Labour, Canadian Industrial Organization, Canadian Labour Congress, (Applicant) v. Kitchener-Waterloo YWCA, (Respondent).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

Unit #2: "all employees of the respondent in Kitchener, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Unit Directors, persons above the rank of Unit Director, Administrative



Assistant, Recreational Co-ordinator, Volunteer Co-ordinator, Life Skills Co-ordinator, Book-keeper.”(4 employees in unit).(*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of respondent	1

### **Applications for Certification Dismissed - No Vote Conducted**

**0988-83-R:**United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. G.W. Harkness Contracting Ltd., (Respondent).(20 employees in unit).

**1740-84-R:**Ontario Public Service Employees Union, (Applicant) v. Sault College of Applied Arts and Technology, (Respondent).(91 employees in unit).

**0688-85-R:**Ontario Catholic Occasional Teachers’ Association, (Applicant) v. The Durham Region Roman Catholic Separate School Board, (Respondent).(96 employees in unit).

**0879-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. First Choice Excavating Ltd., (Respondent).(4 employees in unit).

**0923-85-R:**London and District Service Workers’ Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Craigwiell Gardens c.o.b. as Craigholme Nursing Home, (Respondent).(37 employees in unit).

**0941-85-R:**Hotels, Clubs, Restaurants & Tavern Employees’ Union, Local 261, (Applicant) v. 547691 Ontario Limited, (Respondent).(1 employee in unit).

**1010-85-R:**London and District Building Service Workers’ Union Local 220, (Applicant) v. Salvation Army Men’s Social Service Centre, (Respondent).(39 employees in unit).

**1133-85-R:**United Steelworkers of America, (Applicant) v. Overland Express Division of TNT Canada Inc., (Respondent) v. Group of Employees, (Objectors).(99 employees in unit).

**1159-85-R:**Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. MSL Properties Limited, (Respondent) v. Group of Employees, (Objectors).(15 employees in unit).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

### **Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote**

**0040-85-R:**Communications, Electronic, Electrical, Technical and Salaried Workers of Canada, (Applicant) v. Butterfield Division, Litton Canada Inc., (Respondent).

Unit:“all employees of the respondent at Smith Falls, Ontario, save and except foremen, persons above the rank of foreman, office sales and clerical staff, persons regularly employed for

not more than 24 hours per week and students employed during the school vacation period.”(149 employees in unit).

Number of names of persons on revised voters’ list		128
Number of persons who cast ballots	121	
Number of ballots marked in favour of applicant		41
Number of ballots marked against applicant		80

**0155-85-R:**Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Usarco Ltd., (Respondent).

Unit: “all employees of the respondent at Hamilton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.”(247 employees in unit).

Number of names of persons on revised voters’ list		257
Number of persons who cast ballots	243	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		96
Number of ballots marked against applicant		142
Ballots segregated and not counted		4

**0738-85-R:**Canadian Union of Public Employees, (Applicant) v. The Welland County Roman Catholic Separate School Board, (Respondent).

Unit: “all technical employees of the Welland County Roman Catholic Separate School Board in the Regional Municipality of Niagara, save and except supervisors, those above the rank of supervisor, office and clerical employees and those employees covered by subsisting collective agreement.”(10 employees in unit).

Number of names of persons on revised voters’ list		10
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		7

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**2106-83-R:**United Brotherhood of Carpenters & Joiners of America, Local 1256, (Applicant) v. Ben Bruinsma and Sons Limited, (Respondent) v. Construction Workers Local 53, CLAC (formerly known as Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada), (Intervener).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of Ben Bruinsma and Sons Limited in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen.”(2 employees in unit).

Number of names of persons on revised voters’ list		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		0

Number of ballots marked in favour of intervener	2
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Unit #2: "all carpenters and carpenters' apprentices in the employ of Ben Bruinsma and Sons Limited in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (0 employees in unit).

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	0

**2141-83-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Ben Bruinsma and Sons Limited, (Respondent) v. Construction Workers Local 53, CLAC (formerly known as Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada), (Intervener).

Unit #1: "all employees of Ben Bruinsma and Sons Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	1

Unit #2: "all employees of Ben Bruinsma and Sons Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	2

**0079-85-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Mastrantoni Construction Limited and/or Holiday Carpentry Co. Limited, (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of Mastrantoni Construction Limited and Holiday Carpentry Co. Limited engaged in residential construction in the Province of Ontario, exclusive of the Counties of Essex and Kent, the area within a radius of 81 kilometres of the Timmins Federal Building, the Town of Kirkland Lake and the geographic townships adjacent thereto in the District of Temiskaming, that portion of the District of Algoma south of the 49th parallel of latitude, the Districts of Thunder Bay, Rainy River and Kenora (including the Patricia portion), and that portion of the District of Cochrane north of the 50th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).



Number of names of persons on revised voters' list		10
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		2
Number of ballots marked in favour of intervener		5

**0579-85-R:**International Brotherhood of Electrical Workers Local Union 353, (Applicant) v. R.L.D. Electric, A Division of 618830 Ontario Limited, (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	8

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1765-84-R:**Labourers' International Union of North America, Local 607, (Applicant) v. Intrusion-Prepakt Ltd., (Respondent) v. United Steelworkers of America, (Intervener).

**0361-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation #301, (Respondent).

**0741-85-R:**Labourers' International Union of North America, Local 506, (Applicant) v. Loblaws Limited, Central Canada Grocer's Incorporated, (Respondent) v. United Food and Commercial Workers International Union, Local 1000A, (Intervener).

**0813-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Dawn Enterprises Limited, (Respondent).

**0876-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Harnden & King Construction Ltd., (Respondent).

**0944-85-R:**Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007, 1151, 1244, 1410, 1425, 1592, 1916 and 2309, (Applicant) v. Doef's Ironworks Ltd., (Respondent) v. The International Association of Bridge, Structural & Ornamental Ironworkers and The Ironworkers District Council of Ontario comprised of Local Unions 700, 721, 736, 759 and 786, (Intervener).

**0992-85-R:**Ontario Public Service Employees Union, (Applicant) v. Mini-Skool Limited, (Respondent).

**0998-85-R:**Canadian Union of Public Employees, (Applicant) v. Kinark Child and Family Services, (Respondent).

**1099-85-R:**Ontario Public Service Employees' Union, (Applicant) v. Mallorytown Residence, (Respondent).

**1135-85-R:**Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Humpty Dumpty Foods Limited, (Respondent).

**1137-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Petrolia, (Respondent).

**1174-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. Pinehurst Interior Contractors, (Respondent).

**1216-85-R:**L.I.U.N.A. Local 1081, (Applicant) v. Wil-Mat Holdings Limited, (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**2230-84-R:**Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. Roanne Holdings Limited and Elmont Construction Limited and Bruce N. Huntley Contracting Limited and The Huntley Group, (Respondents).(*Granted*).

**2237-84-R;2238-84-R:**Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. Perwin Construction Co. Limited and Sussex Contractors Ltd., (Respondents).(*Withdrawn*).

**2911-84-R;2912-84-R:**Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Aluminum Specialties (Ontario) Limited and Doug Duberville Siding Ltd. (425211 Ontario Limited), (Respondents).(*Granted*).

**0826-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents).(*Withdrawn*).

**0827-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents).(*Withdrawn*).

**0828-85-R:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents).(*Withdrawn*).

**0830-85-R:**International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents).(*Withdrawn*).

**0832-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents). (*Withdrawn*).

## SALE OF A BUSINESS

**1484-83-R:**International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 680, (Applicant) v. Port Weller Dry Docks, a Division of ULS International Inc., (Respondent) v. International Brotherhood of Electrical Workers, Local 303, (Intervener #1) v. Hamilton Marine, a Division of ULS International Inc., (Intervener #2).(*Dismissed*).

**2229-84-R:**Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. Roanne Holdings Limited, Elmont Construction Limited, Bruce N. Huntley Contracting Limited and The Huntley Group, (Respondents).(*Granted*).

**2237-84-R;2238-84-R:**Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. Perwin Construction Co. Limited and Sussex Contractors Ltd., (Respondents).(*Withdrawn*).

**2911-84-R;2912-84-R:**Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Aluminum Specialties (Ontario) Limited and Doug Duberville Siding Ltd., (425211 Ontario Limited), (Respondents).(*Granted*).

**0659-85-R:**Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607, (Applicant) v. Thunderbrick Limited, Thunder Tile Limited and Great Lakes Ceramics Inc., (Respondents) v. Group of Employees, (Objectors).(*Dismissed*).

**0829-85-R:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents).(*Withdrawn*).

**0831-85-R:**International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. KBM Construction, Division 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents).(*Withdrawn*).

**0833-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents). (*Withdrawn*).

**0906-85-R:**A Council of Trade Unions Acting as Representative and Agent of Teamsters, Local Union 230 and The Labourers' International Union of North America, Local 183, (Applicant) v. Dalv Construction Limited, Dawn Enterprises Limited, (Respondents).(*Withdrawn*).



## CROWN TRANSFER ACT

**0843-85-R:**Ontario Public Service Employees Union, (Applicant) v. The Crown in Right of Ontario as Represented by The Ministry of Community and Social Services, Thistletown Regional Centre and George Hull Centre for Children and Families, (Respondents).(*Withdrawn*).

## UNION SUCCESSOR RIGHTS

**1580-84-R:**The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Primeau Argo Block, (A Division of Lake Ontario Cement), (Respondent).(*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2529-84-R:**Marjorie J. Ball, (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers Local 304, (Respondent) v. Canada Trustco Mortgage Company, (Intervener).

Unit:“all persons employed not more than twenty-four hours per week and students employed during the school vacation by Canada Trustco Mortgage Company at its branch 699 King Street, Cambridge, Ontario, save and except teller supervisors, persons above the rank of teller supervisors and persons regularly employed more than twenty-four hours per week.”(18 employees in unit).(*Granted*).

Number of names of persons on list as originally prepared by employer	19
Number of persons who cast ballots	16
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	13

**2870-84-R:**Pat Steele, (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Respondent) v. Canada Trustco Mortgage Company, (Intervener).

Unit:“all employees of Canada Trustco Mortgage Company, at its Branch 699 King Street, Cambridge, Ontario, N8H 4S6, save and except teller supervisors, persons above the rank of teller supervisors, persons regularly employed not more than twenty-four hours per week and students employed during the school vacation.”(8 employees in unit).(*Granted*).

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9

**3395-84-R:**Niven Glover, (Applicant) v. U.A.W. Local 1285, (Respondent) v. Trident Automotive Products Inc., (Intervener).(121 employees in unit).(*Dismissed*).

**3454-84-R:**James Fernandes, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Schaeffer & Reinthaler Limited, (Intervener).

Unit: "all field employees engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, persons above the rank of party chief, draftsmen, sales office and clerical staff and O.L.S. Articled students." (7 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		8

**3493-84-R:** Bruce McTeer, (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Wark Milk Transport Limited, (Intervener).

Unit: "all employees of Wark Milk Transport Limited, working at and out of Port Elgin, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, students employed during the school vacation, and persons regularly employed for not more than twenty-four (24) hours per week." (14 employees in unit). (*Dismissed*).

Number of names of persons on revised voters' list		14
Number of persons who cast ballots	14	
Number of ballots marked in favour of the respondent		7
Number of ballots marked against respondent		7

**0291-85-R:** June Howell, Christine Allen, (Applicants) v. Amalgamated Clothing & Textile Workers Union (Toronto Joint Board), (Respondent) v. Lee Canada Inc., (Intervener) v. Group of Employees, (Objectors).

Unit: "all the employees of the "employer" at North Bay, Ontario, save and except supervisors, instructing supervisors, persons above the rank of supervisor and instructing supervisor, office staff, sales staff, Gerber Technician(s) and Hughes Marking System Technician(s)." (174 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		176
Number of persons who cast ballots	161	
Number of ballots marked in favour of respondent		28
Number of ballots marked against respondent		133

**0347-85-R:** Mario Perfetti, (Applicant) v. International Brotherhood of Electrical Workers, Local Union 353, (Respondent) v. Gambin Electric Co. Ltd., (Intervener). (9 employees in unit). (*Withdrawn*).

**0366-85-R; 0369-85-R:** Michelle Reynolds, (Applicant) v. United Food & Commercial Workers Local Union 725 AFL-CIO-CLC, (Respondent); Jodie Stowe, (Applicant) v. United Food & Commercial Workers Local Union 725 AFL-CIO-CLC, (Respondent).

Unit #1: "all employees of Better Buy Discount Stores Limited in its stores in Dunnville, Ontario, save and except the store managers, persons above the rank of store manager, persons employed for not more than twenty-four hours per week and students employed on off-school hours and during school vacation." (10 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	12

Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	8

Unit #2: "all employees of Better Buy Discount Stores Limited in its stores in Dunnville, Ontario, employed for not more than twenty-four hours per week and students employed on off-school hours and during school vacation, save and except the store managers, and persons above the rank of store manager." (6 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	6

**0487-85-R:** Iris Price et al, (Applicants) v. Local 9068 United Steel Workers of America, (Respondent) v. Storwal International Inc., (Intervener). (30 employees in unit). (*Dismissed*).

**0490-85-R:** Wendell J.M. Sunega, (Applicant) v. United Steelworkers of America, (Respondent) v. Uddeholm Limited, (Intervener). (20 employees in unit). (*Dismissed*).

**0493-85-R:** A Group of Employees (Petition), (Applicants) v. Office and Professional Employees International Union and its Local 503, (Respondent) v. Sydenham District Hospital, (Intervener). (2 employees in unit). (*Granted*).

**0528-85-R:** Dave Penner and George Froese, (Applicants) v. Local 1669 United Brotherhood of Carpenters and Joiners of America, (Respondents). (2 employees in unit). (*Withdrawn*).

**0744-85-R:** Employees of Steel Cylinder Manufacturing Ltd., (Applicant) v. The Teamsters Union, Local 880, (Respondent). (29 employees in unit). (*Dismissed*).

**0918-85-R:** Group of Employees of Great Lakes Ceramics Inc., (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607, (Respondent) v. Great Lakes Ceramics Inc., (Intervener). (13 employees in unit). (*Dismissed*).

**1125-85-R:** Mark Controls Limited, (Applicant) v. United Steelworkers of America, (Respondent). (3 employees in unit). (*Granted*).

**1168-85-R:** Ray Monette (Union Steward), (Applicant) v. Jimmy Lewis, Labourers' International of North America, Local 1036, (Respondent). (4 employees in unit). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**1240-85-U:** Brampton Hydro-Electric Commission, (Applicant) v. Local 636 of the International Brotherhood of Electrical Workers, (Respondent). (*Withdrawn*).

**1241-85-U:** Brampton Hydro-Electric Commission, (Applicant) v. Local 636 of the International Brotherhood of Electrical Workers and Susan Andrews et al, (Respondents). (*Withdrawn*).



## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)**

**1088-85-U:**Sunwest Developments Ltd., (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 and Vince McNeil, (Respondents).(*Withdrawn*).

**1148-85-U:**State Contractors Limited, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552; Jerry Boyle, E. Deroche, W. Smith, (Respondents). (*Granted*).

**1156-85-U:**Ainsworth Electric Company Limited, (Applicant) v. The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario, Local 353, Ron Carroll, and Robert Rynyk, (Respondents).(*Granted*).

**1189-85-U:**Ainsworth Electric Company Limited, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 and William Weatherup, (Respondents).(*Granted*).

**1282-85-U:**Victory Soya Mills, Division of Central Soya of Canada Limited, (Applicant) v. Those persons named in Schedules "A", "B" and "C" hereto, as amended, (Respondents) v. U.A. Local 46, (Intervener).(*Granted*).

## **COMPLAINTS OF UNFAIR LABOUR PRACTICE**

**2816-83-U:**Jan Gregor, (Complainant) v. The Faculty Association of the University of Windsor and University of Windsor, (Respondents).(*Dismissed*).

**0113-84-U:**William Egan, (Complainant) v. International Brotherhood of Painters and Allied Trades, Local 1590, (Respondent) v. Ontario Hydro, (Intervener).(*Granted*).

**0481-84-U:**International Brotherhood of Electrical Workers, Local 1687, (Complainant) v. Campbell Red Lake Mines Limited, (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener).(*Withdrawn*).

**2751-84-U:**Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Barouh Eaton (Canada) Ltd., (Respondent).(*Withdrawn*).

**3255-84-U:**Soft Drink Workers Joint Local Executive Board of Ontario of the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Pepsi-Cola Canada Limited and Seven-Up Canada Inc., (Respondents).(*Withdrawn*).

**3281-84-U:**John James, (Complainant) v. Labourers' International Union of North America, Local 1036, (Respondent) v. O.J. Pipelines, (Intervener).(*Dismissed*).

**3290-84-U:**London and District Service Workers' Union, Local 220, (Complainant) v. St. Agatha Children's Village of Notre Dame Inc., (Respondent).(*Withdrawn*).

**3306-84-U:**London and District Service Workers' Union, Local 220, (Complainant) v. St. Agatha Children's Village Inc. of Notre Dame, (Respondent).(*Withdrawn*).

**3307-84-U:**London and District Service Workers' Union, Local 220, (Complainant) v. St. Agatha Children's Village of Notre Dame, (Respondent).(*Withdrawn*).

**0194-85-U:**United Food and Commercial Workers International Union, Local 175, (Complainant) v. Corporation of the Town of Dunnville, (Respondent).(*Withdrawn*).

**0360-85-U:**Jeanette Kirkpatrick, (Complainant) v. The Corporation of the Town of Oakville and The Canadian Union of Public Employees, Local 1329, (Respondents).(*Dismissed*).

**0412-85-U;0413-85-U:**S. Wright, Dinah Teffer, M.A. Mothersell, Andrea Porter and C. Boreland, (Complainants) v. Retail, Wholesale and Department Store Union, (Respondent) v. The T. Eaton Company Limited, (Intervener); Suzanne O'Hagan, Barbara Murray, Jean Robbins, Jeff Nelander, Maria Santos and Jean Christie, (Complainants) v. Retail, Wholesale and Department Store Union, (Respondent) v. The T. Eaton Company Limited, (Intervener).(*Dismissed*).

**0431-85-U:**Food and Service Workers of Canada, (Complainant) v. Windsor Arms Hotel Limited, (Respondent).(*Granted*).

**0436-85-U:**Herbert Thomas Lukings, (Complainant) v. National Brewery Workers' Union, Local #1, (Respondent) v. Labatt's Ontario Breweries, (Intervener). (*Dismissed*).

**0483-85-U:**The Ontario Public Service Employees Union, (Complainant) v. McKechnie Ambulance Service Inc., (Respondent).(*Withdrawn*).

**0590-85-U:**Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Westburne Industrial Enterprises Ltd., (Respondent).(*Withdrawn*).

**0604-85-U:**Esther Loslyn Aird, (Complainant) v. Glass, Pottery, Plastics & Allied Workers International Union AFL-CIO-CLC, Local 231, (Respondent) v. American-Standard, (Intervener).(*Dismissed*).

**0614-85-U:**Mark McCarroll, (Complainant) v. Communications, Electronics, Electrical, Technicians and Salaried Workers of Canada, Local 561 and Precious Plate Limited, (Respondents).(*Withdrawn*).

**0628-85-U:**Alexander Zonni, (Complainant) v. U.A.W. Local 439, (Respondent). (*Withdrawn*).

**0645-85-U:**Amalgamated Clothing and Textile Workers Union, (Complainant) v. Imperial Feather Corporation (Toronto) Limited, (Respondent).(*Withdrawn*).

**0646-85-U:**Gaston R. Therrien, (Complainant) v. Local 927, International Typographical Union, (Respondent).(*Dismissed*).

**0722-85-U:**Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Barouh Eaton (Canada) Ltd., (Respondent).(*Withdrawn*).

**0749-85-U:**United Steelworkers of America, (Complainant) v. Keuhne & Nagel International Limited, (Respondent).(*Withdrawn*).

**0806-85-U:**Ontario Nurses' Association, (Complainant) v. Au Chateau Home for the Aged, (Respondent).(*Withdrawn*).

**0822-85-U:**London and District Service Workers' Union, Local 220, (Complainant) v. St. Agatha Children's Village of Notre Dame Inc., (Respondent).(*Withdrawn*).

**0847-85-U:**Service Employees International Union, Local 204 affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Complainant) v. Dalhousie Retirement Home & Medical Clinic, (Respondent).(*Granted*).

**0852-85-U:**Service Employees International Union, Local 204, AFL-CIO-CLC, (Complainant) v. The Ontario Jockey Club, (Respondent).(*Withdrawn*).

**0860-85-U:**United Food and Commercial Workers International Union Local 486, (Complainant) v. River View Nursing Home, (Respondent).(*Withdrawn*).

**0890-85-U:**Mr. M. Venditti, (Complainant) v. Bricklayers' and Masons' Union #1, Ontario, (Respondent).(*Withdrawn*).

**0898-85-U:**Ontario Public Service Employees Union, Local 422, (Complainant) v. Ottawa General Hospital and Dr. A. Nanji, (Respondents).(*Withdrawn*).

**0935-85-U:**Samson Desroches, (Complainant) v. L.I.U.N.A. Local 183, (Respondent).(*Withdrawn*).

**0952-85-U:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Dominion General Manufacturing Ltd., (Respondent).(*Withdrawn*).

**0955-85-U:**Everette Chapelle, (Complainant) v. Amalgamated Transit Union Local 113, (Respondent).(*Withdrawn*).

**0956-85-U:**Service Employees Union, Local 210, affiliated with Service Employees International Union, AFL-CIO-CLC, (Complainant) v. The Exchange, (Respondent). (*Withdrawn*).

**0991-85-U:**Ontario Public Service Employees Union, (Complainant) v. Town & Country Enterprises, (Respondent).(*Withdrawn*).



**1017-85-U:**Greenpark Homes, (Complainant) v. Labourers' International Union of North America, Local 183, and Peter Baldassarra, (Respondent).(*Withdrawn*).

**1019-85-U:**Ronald M. Piercey, (Complainant) v. U.A.W. Local 458 and Massey Ferguson Industries, (Respondent).(*Withdrawn*).

**1035-85-U:**Mildred Leroux, (Complainant) v. C.U.P.E., Local 794, (Respondent).(*Withdrawn*).

**1037-85-U:**United Food and Commercial Workers International Union, Local 175, (Complainant) v. Corporation of the Town of Dunnville, (Respondent).(*Withdrawn*).

**1048-85-U:**Laundry and Linen Drivers and Industrial Workers Union, Teamsters Union, Local 847, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Star Quality Furniture Mfg. Ltd., (Respondent).(*Withdrawn*).

**1067-85-U:**Joseph Lafromboise, (Complainant) v. International Union of Operating Engineers, (Respondent).(*Withdrawn*).

**1146-85-U:**Canadian Union of Public Employees, Local 6, (Complainant) v. The Corporation of the Town of Valley East, (Respondent).(*Withdrawn*).

**1161-85-U:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Lumberking Home Centre, (Respondent).(*Withdrawn*).

**1188-85-U:**Canadian Union of Public Employees, Local 2412, (Complainant) v. Sudbury & District Ambulance Services, (Respondent).(*Withdrawn*).

**1195-85-U:**Douglas Watson, (Complainant) v. Labourers' International Union of North America, Local 1036 (James Lewis, Manager), (Respondent).(*Withdrawn*).

**1247-85-U:**Steve Sadlak, (Complainant) v. Teamsters Local 879 and Dominion Consolidated Truck Lines (TNT), (Respondents).(*Withdrawn*).

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0903-85-M:**Work Wear Corporation of Canada Ltd., (Employer) v. Retail, Wholesale and Department Store Union, Local 582, (Trade Union).(*Granted*).

**1002-85-M:**Professional Staff Association of the Children's Aid Society of Hamilton-Wentworth, (Employer) v. The Children's Aid Society of Hamilton-Wentworth, (Trade Union).(*Granted*).

**1094-85-M:**Advanced Extrusions Limited, (Employer) v. Independent Canadian Steelworkers Union, (Trade Union).(*Granted*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**0388-85-M:**S.E.U. Local 183, (Applicant) v. Central Park Lodge (Ottawa), (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**2018-84-OH:**C. Douglas Sproule, (Complainant) v. Frankel Steel Ltd., (Respondent). (*Granted*).

**3432-84-OH:**United Electrical, Radio & Machine Workers of Canada, (Complainant) v. Camco Inc., (Respondent).(*Withdrawn*).

**0685-85-OH:**Glen Oickle, 766 Barton St. E., Hamilton, Ont., (Complainant) v. Hamilton Haldimand Stationary 270 Sherman N. Dave Bell, (Respondent). (*Withdrawn*).

**1003-85-OH:**Robert J. Hamilton, Chairman, U.A.W., Local 127, I.H.C. Unit, (Complainant) v. International Harvester Company Canada, 508 Richmond Street, Chatham, Ontario, (Respondent).(*Withdrawn*).

## COLLEGES COLLECTIVE BARGAINING ACT

**1083-84-U:**Ontario Public Service Employees Union, (Complainant) v. Algonquin College of Applied Arts and Technology, (Respondent).(*Dismissed*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**2837-83-M:**Ontario Allied Construction Trades Council, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondents). (*Dismissed*).

**2686-84-M:**The Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates listed in Schedule "A", (Applicant) v. Zalcar Engineering and Contracting Co. Ltd. and Zalcar Engineering and Contracting Co. (1983) Ltd., (Respondents).(*Withdrawn*).

**2728-84-M:**The Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates listed in Schedule "A", (Applicant) v. Harbridge & Cross Ltd., (Respondent).(*Dismissed*).

**2755-84-M:**Sheet Metal Workers International Association Local Union 504, (Applicant) v. Biscombe B.R.S. Limited, (Respondent).(*Granted*).

**0130-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Piggott Construction Limited, (Respondent).(*Granted*).

**0141-85-M:**Millwrights, District Council of Ontario on behalf of Local 1244, (Applicant) v. R.J. Cyr Co. Inc., (Respondent) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Intervener #1) v. Millwright Contractors Association of Ontario Inc., (Intervener #2).(*Withdrawn*).

**0163-85-M:**The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508, (Applicant) v. Bennett Mechanical, (Respondent).(*Withdrawn*).

**0245-85-M:**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, (Applicant) v. Vollmer & Associates Contractors Limited, (Respondent).(*Withdrawn*).

**0327-85-M:**International Union of Elevator Constructors, Local 90, (Applicant) v. Otis Elevator Company Limited, (Respondent).(*Withdrawn*).

**0571-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Loblaw's Groceries Co., (Respondent).(*Withdrawn*).

**0664-85-M:**Labourers' International Union of North America, Local 1059, (Applicant) v. Aveiro Construction Limited, (Respondent).(*Withdrawn*).

**0719-85-M:**Local Union No. 47, Sheet Metal Workers' International Association, (Applicant) v. Glenlin Mechanical Inc., (Respondent).(*Granted*).

**0774-85-M:**International Brotherhood of Electrical Workers Local Union 353, (Applicant) v. Trident Holdings Ltd., c.o.b. as Trident Electric, (Respondent). (*Granted*).

**0857-85-M:**International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Standard Insulation Limited, (Respondent). (*Granted*).

**0899-85-M:**Labourers' International Union of North America, Local 607, (Applicant) v. Tesc Contracting Limited, (Respondent).(*Withdrawn*).

**0902-85-M:**Labourers' International Union of North America, Local 607, (Applicant) v. Tesc Contracting Limited, (Respondent).(*Withdrawn*).

**0907-85-M:**Sheet Metal Workers International Association, Local 504, (Applicant) v. A. Kenagy Heating & Ventilation Ltd., (Respondent).(*Granted*).

**0909-85-M:**Labourers' International Union of North America, Local 1059, (Applicant) v. KBM Construction, Division of 414226 Ontario Limited, Concord Manufacturing Corporation and Aveiro Construction Limited, (Respondents).(*Withdrawn*).

**0914-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. E.G.M. Cape & Company Ltd., (Respondent).(*Withdrawn*).

**0928-85-M:**Labourers' International Union of North America, Local 247, (Applicant) v. H.J. McFarland Construction Company, (Respondent).(*Withdrawn*).



**0949-85-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 759, (Applicant) v. Weldland Steel Ltd., (Respondent). (*Withdrawn*).

**0950-85-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 759, (Applicant) v. Sentinel Steel Erectors Ltd., (Respondent).(*Withdrawn*).

**0951-85-M:**Labourers' International Union of North America, Local 1059, (Applicant) v. Loblaw Groceterias Co. Ltd. Construction Central Canada Grocer's Inc., (Respondent).(*Withdrawn*).

**0979-85-M:**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508, (Applicant) v. Tesc Contracting Ltd., (Respondent).(*Withdrawn*).

**1001-85-M:**The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7 Canada, (Applicant) v. R.R. Marcel Masonry Ltd., (Respondent).(*Withdrawn*).

**1008-85-M:**International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Spark Steel Erectors Ltd., (Respondent). (*Withdrawn*).

**1023-85-M:**Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Spring Plastering Limited, (Respondent).(*Granted*).

**1031-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Duet Interior Systems, (Respondent).(*Withdrawn*).

**1032-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Duet Interior Systems, (Respondent).(*Withdrawn*).

**1049-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Finkle Crane Rentals Limited, (Respondent).(*Granted*).

**1051-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Kent County Contractors, a Division of 504961 Ontario Ltd., (Respondent).(*Granted*).

**1052-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Williams Contracting Ltd., (Respondent).(*Withdrawn*).

**1053-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Williams Contracting Ltd., (Respondent).(*Withdrawn*).

**1054-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Williams Contracting Ltd., (Respondent).(*Withdrawn*).

**1079-85-M:**International Union of Operating Engineers, Local 793, (Applicant) v. Towland-Hewitson Construction Limited, (Respondent).(*Withdrawn*).

**1091-85-M:**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787, (Applicant) v. Clare Moore Limited, (Respondent).(*Withdrawn*).

**1102-85-M:**Labourers' International Union of North America, Local 527, (Applicant) v. A.B.T. Tile and Marble Co. Ltd., (Respondent).(*Withdrawn*).

**1109-85-M:**Labourers' International Union of North America, Local 527, (Applicant) v. Bellai Brothers Limited, (Respondent).(*Withdrawn*).

**1110-85-M:**L.I.U.N.A. Local 527, (Applicant) v. W.G. McDonald Construction Co., (Respondent).(*Withdrawn*).

**1111-85-M:**International Brotherhood of Electrical Workers Local Union 353 Member of I.B.E.W., C.C.O., (Applicant) v. Agnew Electric, (Respondent).(*Granted*).

**1118-85-M:**Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tamerlane Drywall Limited, (Respondent).(*Withdrawn*).

**1122-85-M:**Labourers' International Union of North America, Local 527, (Applicant) v. Gati-neau Concrete Floor and Plaster Limited, (Respondent).(*Withdrawn*).

**1130-85-M:**Resilient Floorworkers, Local 2965, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Richmond Tile and Terazzo Ltd., (Respondent).(*Withdrawn*).

**1131-85-M:**Resilient Floorworkers, Local Union 2965, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. E.C.I. Limited, (Respondent). (*Withdrawn*).

**1132-85-M:**Resilient Floorworkers, Local Union 2965, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. E.C.I. Limited, (Respondent). (*Withdrawn*).

**1185-85-M:**L.I.U.N.A. Local 491, (Applicant) v. Traugott Construction Limited, (Respondent).(*Withdrawn*).

**1187-85-M:**Labourers' International Union of North America, Local 1059, (Applicant) v. Joe Franze Concrete Limited, (Respondent).(*Withdrawn*).

**1193-85-M:**Operative Plasterers' and Cement Masons' International Association of United States and Canada Local 598, (Applicant) v. Yorkview Concrete Finishing Ltd., (Respondent).(*Granted*).

**1208-85-M:**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787, (Applicant) v. 429408 Ontario Limited c.o.b. as HECO, (Respondent).(*Withdrawn*).

**1211-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Dias & Lorenzo Construction Limited, (Respondent).(*Withdrawn*).

**1230-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Gerry Macera Contracting Limited, (Respondent).(*Withdrawn*).

**1233-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Concord Concrete and Drain Incorporated, (Respondent).(*Withdrawn*).

**1234-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. Lucy Construction Limited, (Respondent).(*Withdrawn*).

**1254-85-M:**Labourers' International Union of North America, Local 183, (Applicant) v. M.M. Construction Company Limited, (Respondent).(*Withdrawn*).

**1265-85-M:**Labourers' International Union of North America, Local 527, (Applicant) v. Duron Ottawa Limited, (Respondent).(*Withdrawn*).

#### **APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION**

**1822-84-R;1823-84-R:**United Food & Commercial Workers International Union, Local 175, (Applicant) v. 389393 Ontario Ltd. c.o.b. as Boucher's Amherstview Supermarket, (Respondent) v. Group of Employees, (Objectors); United Food & Commercial Workers International Union, Local 633, (Applicant) v. 389393 Ontario Ltd., c.o.b. as Boucher's Amherstview Supermarket, (Respondent) v. Group of Employees, (Objectors).(*Granted*).

**3102-84-R:**The United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Riva Plumbing Ltd., (Respondent).(*Granted*).

**0506-85-R:**Service Employees International Union Local 204 affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Dalhousie Retirement Home Ltd., (Respondent).(*Denied*).







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